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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 162

SHIRLEY KREMEN, SAMUEL IRVING COLEMAN, and SIDNEY STEINBERG,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

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Subject Index

	Page
Citation to opinions below	1
Jurisdiction	2
Constitutional provisions and statutes involved	2
Questions presented	5
Statement	12
Specification of errors	20
Summary of argument	20
Argument	26
I. The arrests of petitioners Kremen and Coleman without warrant violated their constitutional rights; the searches of all petitioners and of the premises, and the seizure of the books, papers and effects, all without warrant, and the subsequent introduction of this evidence against all petitioners, violated the constitutional rights of all petitioners.	26
(A) The arrest of petitioners Kremen and Coleman without warrant violated their constitutional rights	26
1. The principles against which the lawfulness of the arrests must be tested	29
a. The Fourth Amendment	29
b. The rules and the statute	30
2. Tested by the foregoing principles, the arrests were invalid	32
(B) The searches of all petitioners, and the premises and the seizure of their books, papers and effects, all without warrant, violated their constitutional rights	37
1. The facts of the search	37
2. The constitutional principles applicable to the searches	41

Page

3. Tested by the foregoing principles, the searches were invalid 42

a. The searches do not fall within the narrow scope of the "incident to arrest" exemption 43

b. There were no exceptional circumstances which justified the search without warrant 52

II. Sections 3, 371 and 1071 of Title 18 of the United States Code were unconstitutionally applied to petitioners in that (A) petitioners were placed in double jeopardy by an unconstitutional pyramiding of offenses; (B) Section 3 was construed in a manner contrary to the common law and to the requirements of the Fifth and Sixth Amendments; and (C) the sections were applied to petitioners in the absence of any evidence of scienter 58

(A) Petitioners were placed in double jeopardy by an unconstitutional pyramiding of offenses 58

1. The conviction of petitioners Kremen and Coleman on both the accessoryship and harboring counts is invalid or, in the alternative, the conviction of petitioners Kremen and Steinberg on the accessoryship counts must be reversed for lack of evidence to support it 60

2. The conviction of petitioners Kremen and Coleman for participating in two conspiracies is invalid 62

3. The conviction of all petitioners on the conspiracy counts, in addition to their convictions on the substantive counts is invalid 63

(B) Section 3 was construed and applied in a manner contrary to the common law and to the requirements of the Fifth and Sixth Amendments 66

(C) The statutes were improperly applied to petitioners in the absence of any proof of scienter 73

Page

1. The harboring counts 73

2. The accessoryship counts 76

III. The conviction of petitioners on Counts 1 and 2 of the indictment cannot be sustained because (A) these counts did not allege facts sufficient to constitute an offense against the United States; (B) There was a fatal variance between the pleading of Thompson's conviction and the proof thereof; and (C) the charge with respect to Thompson's conviction was erroneous 79

(A) Counts 1 and 2 did not allege facts sufficient to constitute an offense against the United States 79

(B) There was a fatal variance between the pleading of Thompson's conviction and the proof thereof 82

(C) The charge with respect to Thompson's conviction was erroneous 83

onclusion 86

Table of Authorities Cited

Cases	Pages
Agnello v. United States, 269 U.S. 20	22, 42, 43, 44, 46, 49, 50
Albrecht v. United States, 273 U.S. 1	29
Baxter v. United States, 188 F. 2d 119 (6 Cir.)	22, 44, 45
Bell v. United States, 349 U.S. 81	62
Bollenbach v. United States, 326 U.S. 607	84
Boyd v. United States, 116 U.S. 616	41, 43
Braverman v. United States, 317 U.S. 49	23, 63
Brinegar v. United States, 338 U.S. 160	21, 23, 35, 54
Bushouse v. United States, 67 F. 2d 843 (6 Cir.)	47
Byars v. United States, 273 U.S. 28	28
Carroll v. United States, 267 U.S. 132	21, 23, 35, 52, 53, 54
Cole v. Arkansas, 333 U.S. 196	25, 83
Commonwealth v. Miller, 2 Ashm. 61	69
Coplon v. United States, 185 F.2d 629 (2 Cir.), cert. den. 342 U.S. 920	21, 23, 31
Cruikshank v. United States, 92 U.S. 542	25
Davis v. United States, 328 U.S. 582	42, 44
DeJonge v. Oregon, 299 U.S. 353	25, 83
Dennis v. United States, 341 U.S. 494	5, 8, 13, 81, 82
Dent v. State, 43 Tex. Cr. 123, 65 S.W. 2d 627	71
Dimenza v. Johnson, 130 F. 2d 465 (9 Cir.)	65
Entick v. Carrington, 19 How. St. Tr. 1029	41
Ex parte Collett, 337 U.S. 55	71
Frohwerk v. United States, 249 U.S. 204	63
Fulbright v. United States, 91 F.2d 210 (8 Cir.)	11, 21, 24, 34, 73, 76
Gebardi v. United States, 287 U.S. 112	23, 65
Go-Bart Importing Co. v. United States, 282 U.S. 344	10, 22, 42, 48, 51
Gouled v. United States, 255 U.S. 298	10, 41, 43
Grau v. United States, 257 U.S. 124	42
Guilbeau v. United States, 287 F. 731 (5 Cir.)	83

Pages

Hammer v. United States, 271 U.S. 620 82
Harrison v. United States, 7 F. 2d 259 (2 Cir.) 59
Henderson v. United States, 12 F. 2d 528 (4 Cir.) 47
Holland v. United States, 348 U.S. 121 ..... 75, 78, 81

Jeffers v. United States, 342 U.S. 48 55
Johnson v. United States, 333 U.S. 10 .....
..... 2, 23, 31, 33, 42, 52, 54, 55, 56, 57

Krulewitch v. United States, 336 U.S. 440 59

Lanzetta v. New Jersey, 306 U.S. 451 70

Maggio v. Zietz, 333 U.S. 56 ..... 24, 75
Marron v. United States, 275 U.S. 192 ..... 49, 50, 51
McDonald v. United States, 335 U.S. 451 .....
..... 10, 21, 22, 23, 37, 42, 44, 56
McGrain v. Daugherty, 273 U.S. 135 ..... 21, 29
McKnight v. United States, 183 F. 2d 977 (D.C. Cir.) 47
Mesarosh v. United States, 352 U.S. 87

Neal v. United States, 102 F. 2d 643 (8 Cir.) 76, 83
Nye & Nissen v. United States, 336 U. S. 619 67

O'Neill v. United States, 236 F. 2d 636 (6 Cir.) 65

Papini v. United States, 84 F. 2d 160 (9 Cir.) 44, 46, 47
People v. Brite, 9 C. 2d 666 32
People v. Craig, 152 C. 42 32
People v. Yee, 145 A.C.A. 607 (Calif.) 32
Perreira v. United States, 341 U.S. 1 ..... 23, 60
Pettway v. United States, 216 F. 2d 106 (6 Cir.) 82
Pierce v. United States, 314 U.S. 306 69
Pinkerton v. United States, 328 U.S. 640 65

Quinn v. United States, 349 U.S. 155 42

Rex v. Burridge, 3 P. Wms. 439 69
Rex v. Greenacre, 8 Car. & P. 35 69
Robinson v. United States, 143 F. 2d 276 (10 Cir.) 65
Rose v. United States, 149 F. 2d 755 (9 Cir.) 82

Pages

Schneiderman v. United States, 320 U.S. 118 77
Short v. United States, 91 F. 2d 614 (4 Cir.) 62
Silverthorne Lumber Co. v. United States, 251 U.S. 385 .....42, 43
Skelly v. United States, 76 F. 2d 483 (10 Cir.) cert. den.
295 U.S. 767 .....11, 24, 66, 67, 71, 77
Slochower v. Board of Higher Education, 350 U.S. 511 77
Smith v. United States, 211 F. 2d 957 (6 Cir.) 65
Stack v. Boyle, 342 U.S. 1 77
Steeber v. United States, 198 F. 2d 615 (10 Cir.) 22, 46

Takahashi v. United States, 143 F. 2d 118 (9 Cir.) 47
Taylor v. United States, 286 U.S. 1 47
Tot v. United States, 319 U.S. 463 .....74, 75

United States v. Adams, 281 U.S. 202 63
United States v. Ausmeier, 152 F. 2d 349 (2 Cir.) 34
United States v. Chapman, 3 F. Supp. 903 (S.D. Ala.) 66
United States v. Cohen, 197 F. 2d 26 (3 Cir.) 63
United States v. Coplon, 185 F. 2d 629 (2 Cir.) 39, 56
United States v. Cruikshank, 92 U.S. 542 79
United States v. Di Re, 322 U.S. 581 .....21, 28, 29, 35, 53, 54
United States v. Falcone, 109 F. 2d 579 59
United States v. Green, 140 F. Supp. 117 (S.D.N.Y.) 13
United States v. Hutcheson, 312 U.S. 219 82
United States v. Jeffers, 342 U.S. 48 .....10, 22, 23, 42, 44, 46, 56
United States v. Katz, 271 U.S. 354 65
United States v. Kirschenblatt, 16 F. 2d 202 (2 Cir.) 49
United States v. Lee, 83 F. 2d 195 (2 Cir.) 46
United States v. Lefkowitz, 285 U.S. 452 ....10, 22, 42, 48, 51, 57
United States v. Lindenfeld, 142 F. 2d 829 (2 Cir.) ..49, 50, 51, 52
United States v. National City Lines, 337 U.S. 78 71
United States v. Paglia, 190 F. 2d 445 (2 Cir.) 67
United States v. Peoni, 100 F. 2d 401 (2 Cir.) 67
United States v. Perlstein, 126 F. 2d 789 (3 Cir.) 34
United States v. Pincourt, 159 F. 2d 917 (3 Cir.) 34
United States v. Rabb, 141 F. 2d 46 .....21, 29
United States v. Rabinowitz, 238 U.S. 78 .....44, 49, 50, 63
United States v. Stein, 140 F.Supp. 761 (S.D.N.Y.) 81
United States v. Thomas, 113 F. 2d 643 (7 Cir.) 21
United States v. Thompson, 113 F. 2d 643 (7 Cir.) 37

Pages

United States v. Thompson, 214 F. 2d 545 (2 Cir.) 5
United States v. Trachtenberg, et al., S.D.N.Y., No. C-136-7 58
United States v. Univer[illegible] C.I.T. Credit Corp., 344 U.S. 218 ..... 23, 62
United States v. Weitzel, 246 U.S. 533 70

Weeks v. United States, 232 U.S. 383 ..... 42, 43, 47
Wieman v. Updegraf, 344 U.S. 183 ..... 25, 71
Williams v. United States, 179 F. 2d 644 (5 Cir.) 70
Williamson v. United States, 184 F. 2d 280 (2 Cir.) 37
Worthington v. United States, 166 F. 2d 557 (6 Cir.) ... 29, 31, 44
Wrightson v. United States, 222 F.2d 556 (D.C. Cir.) .. 21, 29, 30

Constitutions

United States Constitution:
First Amendment 83
Fourth Amendment 2, 6, 11, 20, 29, 46, 47, 54, 57
Fifth Amendment 2, 3, 11, 12, 20, 46, 47, 54, 57, 59
Sixth Amendment 2, 3, 11, 20

Miscellaneous

93 Cong. R. 5181-82 71
94 Cong. R. 7928, 8906 71

H. R. Rep. 304, 80th Cong., 1st Sess. 71
H. R. 1600, 80th Cong., 1st Sess. 71
H. R. 2055, 80th Cong., 1st Sess. 71
H. R. Rep. 1928, 83d Cong., 2nd Sess. 58

Sen. Rep. 1620, 80th Cong., 2nd Sess. 71
Sen. Rep. 2141, 83rd Cong., 2nd Sess. 58

Rules

Federal Rules of Criminal Procedure:
Rule 3 30
Rule 4 ..... 21, 30
Rule 41 ..... 22, 52

Statutes

Pages

Title II, Section 26 (National Prohibition Act, 41 Stat. 315, 27 U.S.C.A. 40) 52

Smith Act, Sections 2, 3 and 5 ..... 6, 79, 80, 82

Texas Penal Code, Art. 86 71

Title 18, U.S.C., Chapter 1 (General Provisions) 72

18 U.S.C. 3 ..... 2, 3, 6, 11, 12, 20, 24, 66, 69, 76
18 U.S.C. 371 ..... 2, 4, 11, 20
18 U.S.C.A. 751 ..... 24, 72
18 U.S.C. 1071 ..... 2, 4, 7, 11, 12, 20, 24, 58, 59, 72, 73
18 U.S.C.A. 2236 45
18 U.S.C.A. 2384 83
18 U.S.C. 2385 ..... 12, 79, 83
18 U.S.C.A. 3052 ..... 21, 29, 31, 35
18 U.S.C.A. 3053 29
18 U.S.C.A. 3107 ..... 23, 53

28 U.S.C.A. 631 56
28 U.S.C.A. 1254(1) 2

Texts

47 Am. Jur., Searches and Seizures, 58 42

47 Am. Jur. 507, n. 6 42

Bishop, Criminal Law (9th Ed.):
Section 692 70
Section 697, pages 500-501 69

9 Halsbury's Laws of England (2d ed.), Sections 593-599 .. 68

2 Hawkins P. C. Section 29 68

"The History and Development of the Fourth Amendment to the United States Constitution", Lasson, Series LV No. 2 (Johns Hopkins University Studies in Historical and Political Science, 1937), pages 35, 95, 117 and 132..... 29

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

CITATION TO OPINIONS BELOW.

A written order of the District Court, denying a motion for the return of property allegedly illegally seized, was not reported, but appears at pages 26-28 of the Record and is printed at pages 1 to 3 of the Appendix to the Petition for Writ of Certiorari.[1] Opinions relating to the fixing of bail are reported at 114 F. Supp. 899, 207 F. 2d 772, and 100 L. Ed. 704. The three opinions of the Court of Appeals which ac-

[1]Cited herein as "App."

companied the affirmance of the judgments of conviction are reported at 231 F. 2d 155, 178 and 178.[2] They appear at pages 943, 984 and 985 of the Record and are printed at pages 4, 62 and 63 of the Appendix to the Petition for Certiorari herein, as are the judgment of the Court of Appeals and its order denying the petition for rehearing. (App. 74, 75; and See R. 992, 993.)[3]

JURISDICTION.

The judgment of the Court of Appeals was entered on January 20, 1956 (231 F. 2d 155; R. 992; App. 74). A timely petition for rehearing was denied on April 20, 1956 (231 F. 2d 155; R. 993; App. 75). On May 7, 1956, Mr. Justice Douglas extended, until June 18, 1956, the time within which petitioners might file a petition for certiorari (R. 993). The petition was dated June 11, 1956 and was filed on June 14, 1956. It was granted on October 8, 1956 (R. 994).

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Fourth, Fifth and Sixth Amendments to the Constitution, and Sections 3, 371 and 1071 of Title 18,

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[2]Circuit Judge Lemmon wrote an "affirming opinion"; Circuit Judge Healy wrote a concurring opinion; Chief Judge Denman wrote a dissenting opinion.

[3]Chief Judge Denman dissented from the order denying the petition for rehearing. No opinions accompanied that order.

United States Code, which are involved in this case, read, in pertinent part, as follows:

Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand July, . . . nor shall [any person] be compelled in any criminal case to be a witness against himself, nor shall any person be deprived of life, liberty, or property, without due process of law . . ."

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ."

18 U.S.C. 3, upon which the first count of the indictment was based:

"Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

"Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maxi-

mum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by death, the accessory shall be imprisoned not more than ten years."

18 U.S.C. 371, upon which the second and fourth counts of the indictment were based:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

18 U.S.C. 1071, upon which the third count of the indictment was based:

"Whoever harbors or conceals any person for whose arrest a warrant or process has been issued under the provisions of any law of the United States, so as to prevent his discovery and arrest, after notice or knowledge of the fact that a warrant or process has been issued for the apprehension of such persons, shall be fined not more than $1,000 or imprisoned not more than six months, or both."

QUESTIONS PRESENTED.

Petitioners were arrested, without warrants[4], in August of 1953 in a "raid" (R. 395, 529) conducted by agents of the Federal Bureau of Investigation at a dwelling house in Twain Harte, California. Present at the time, in addition to petitioners, was Robert Thompson, one of the defendants in *Dennis v. United States*, 341 U. S. 494, who had failed to surrender after this Court's decision in that case (see *United States v. Thompson*, 214 F. 2d 545 [2 Cir.]). After the arrests, the agents, in absence of petitioners (R. 102-105), without search warrants, seized all of the papers, books, personal effects and movable property located on the premises (R. 286), and transported all of this material, together with two automobiles and their contents, some 200 miles to San Francisco where it was studied and analyzed at the officers' leisure (R. 215, 289).

The sheer physical quantity of the materials so seized is indicated by the fact that 25 closely typewritten pages were required merely to prepare an inventory of the items taken by the arresting officers (Ex. A; R. 109[5]). Those items included, *inter alia*, a great variety of papers, clothing, money, kitchen utensils, fishing gear, toilet articles, personal effects, furniture, two automobiles—indeed, almost everything imaginable.

A week after the arrests, an agent returned to the premises, in the absence of petitioners and, without warrant, he searched a garbage can in an outhouse and

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[4]This does not apply to petitioner Steinberg. As to him see n. 27, *infra*.

[5]Attached hereto as Appendix A.

seized some ten empty beer cans (R. 384-385), on some of which were found fingerprints of petitioners (R. 446-451).

After petitioners were brought to San Francisco they were taken before a commissioner and complaints were sworn to (R. 103, 289).[6] Ultimately a four count indictment (R. 3-8) was returned by the Grand Jury, charging all three petitioners and others[7] with:

1. Violating 18 U.S.C. 3 by receiving, relieving, comforting and assisting Thompson in order to prevent his apprehension and arrest, knowing that Thompson had been convicted of "wilfully and knowingly conspiring to (1) organize a society for the overthrow and destruction of the Government of the United States by force and violence; and (2) advocate and teach the overthrow and destruction of the Government of the United States by force and violence; the aforesaid being in violation of Sections 2, 3 and 5 of the Act of June 20, 1940, commonly known as the Smith Act" (R. 3).

2. Conspiring to commit the aforesaid offense with knowledge that Thompson had violated Sections 2, 3 and 5 of the Smith Act (R. 4). The only overt act alleged which had reference to Thompson was that peti-

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[6]And *after* the arrests had been consummated, a warrant was obtained to permit a search of Blau's (see note 7, *infra*) apartment (R. 741, 761).

[7]One person (Patricia Blau), later arrested at a different place, was jointly charged with petitioners, but as to her a judgment of acquittal was entered at the close of the prosecution's case (R. 75, 912). Another person (Carl Ross), who was found guilty with petitioners, was unable to raise the bail required by the court below and, having completed his sentence, is not a party to the present proceeding.

tioners occupied a cabin with Thompson on the day of the arrest, August 27, 1953.

Petitioners Kremen and Coleman were further charged with:

3. Violating 18 U.S.C. 1071 by harboring and concealing petitioner Steinberg, "with notice and knowledge . . . that a warrant had been issued for [his] apprehension" (R. 6).

4. Conspiring to commit the aforesaid offense with knowledge that a warrant had been issued for Steinberg's arrest (R. 7). The only overt act involving these petitioners which had reference to Steinberg was that they occupied the cabin with him on the day of the arrest (R. 8).

A pre-trial motion to dismiss the indictment because (1) it failed to state facts sufficient to constitute an offense; (2) it was vague and indefinite; and (3) the statutes upon which it was based were unconstitutionally applied to petitioners here, was made (R. 9-14) and overruled (R. 72). Also overruled were motions for discovery and inspection (R. 14), for a bill of particulars (R. 15), and for a pre-trial subpoena (R. 17).

Motions (R. 18-26) for the return of property seized in the raid and for its suppression as evidence were denied (R. 26-28). However, the prosecution was ordered to (R. 28), and did, furnish the 25 page inventory of the seized property already referred to (Ex. A; R. 109). The motions to return the property and to suppress it as evidence were later renewed and, after testimony was taken on the motions (R. 89-138, 164-180), they were

again denied (R. 73). Throughout the trial, by appropriate objections to the introduction of evidence and otherwise, petitioners continued to press this point (R. 204, 216, 217, 228, 231).

The evidence adduced upon the trial showed (1) that Thompson had been convicted in *Dennis* of conspiring to organize the Communist Party "to teach and advocate" the forcible overthrow of government;[8] (2) that Thompson had not surrendered after *Dennis* (there was no showing that Thompson was ever ordered or directed to surrender or that petitioners ever knew of such an order or direction, if one existed); (3) that a bench warrant had been issued in 1951 for Steinberg (there was no showing that petitioners [including Steinberg] ever knew of the existence of that warrant); (4) that petitioners were with Thompson in the Twain Harte house on the morning of the arrests; (5) that agents of the Federal Bureau of Investigation seized from the persons of petitioners[9] and Thompson, and from the house, papers and documents bearing fictitious names; (6) that the appearances of Steinberg and Thompson were different in 1953 from what they had been in earlier years; (7) that for some time preceding the raid Coleman had been in Thompson's company at places in

[8]Ex. 121; R. 901. The quoted words are omitted from the indictment here (*supra*, p. 6).

[9]Not, however, from the person of petitioner Coleman. As to him, the record shows that at the time of his arrest he was wearing only a pair of swimming trunks (R. 194) and that no evidence was taken from his person. Every bit of the evidence used against him was obtained as a result of the search of the cabin (R. 297), carried out without a warrant. It was never shown that he had any connection or association with any of the articles so seized (R. 299).

Missouri and Montana; (8) that Coleman had associated with Thompson and possibly Steinberg in New York City ten years earlier in the Communist Party.

Except for the fact that they were all at the house at the time of the arrest, this last item was the *only* connection between Coleman, Thompson and Steinberg. In other words, they were together at Twain Harte and they were Communists. This is the only evidence tying these petitioners to each other and to Thompson. This is the only evidence of a "conspiracy."[10]

Petitioners' motions for judgments of acquittal, made at the conclusion of the Government's case, were denied (R. 75). The jury returned a verdict of guilty against petitioners on all counts.[11] A new motion for judgments of acquittal, as well as motions in arrest of judgment and for a new trial, subsequently made, were all denied (R. 76).

Judgments of imprisonment were pronounced as follows:

Petitioner Kremen: one year on Count 1 and one year on Count 2, to run concurrently, six months on Count

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[10]This, however, does not even apply to petitioner Kremen. Concerning her there is no showing whatsoever of Communist membership or association, or any connection with any of the others, save and except in Twain Harte during the summer of 1953. The prosecution was seriously concerned about this deficiency in its evidence and, to remedy it, sought, unsuccessfully, to show that while a student in Los Angeles in 1949, she had a "strong familiarity" with the "left wing attitude" (R. 847). The trial judge quite correctly did not permit proof to be offered along these lines.

[11]The jury was out approximately nine hours (R. 929, 939). Just twenty minutes before it returned its verdict, it reported its inability to agree on some counts (R. 937). After further instructions (R. 938-939), it convicted on all counts.

3 and six months on Count 4, to run concurrently with each other and with the sentences imposed on Counts 1 and 2: total imprisonment, one year.

Petitioner Coleman: one year on Count 1, one year on Count 2, six months on Count 3 and six months on Count 4, *all to run consecutively:* total imprisonment, three years.

Petitioner Steinberg: two years on Count 1, one year on Count 2, *both to run consecutively:* total imprisonment, three years.

Notices of appeal (R. 76-80) were timely filed.

The Court of Appeals, Chief Judge Denman dissenting, expressing its "own views and deep feeling on the subject [of Communism]" said it would not "chase Constitutional phantoms that will lead us to assist a group of subversives in escaping condign punishment" (231 F. 2d 178; R. 984; App. 61).[12] It held therefore that (1) despite the absence of arrest and search warrants, and in the face of this Court's opinions in *Gouled v. United States,* 225 U. S. 298; *United States v. Lefkowitz,* 285 U. S. 452; *Go-Bart Importing Co. v. United States,* 292 U. S. 344; *Johnson v. United States,* 333 U.S. 10; *McDonald v. United States,* 335 U.S. 451; and *United States v. Jeffers,* 342 U.S. 48;[13] petitioners' con-

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[12]Although there was no evidence to justify such a characterization, Judge Lemmon referred to petitioners as "these enemies of the United States" (231 F. 2d at 178; R. 984; App. 61). Judge Healy's brief concurrence was more moderately and judiciously worded (231 F. 2d 178; R. 985; App. 62).

[13]None of which were mentioned in the affirming opinions, although they were cited to the court below in the briefs, and although the *Lefkowitz* case was cited in the dissenting opinion.

stitutional rights were not invaded by the arrests, searches and seizures; (2) despite the decisions in *Skelly v. United States,* 76 F. 2d 483 (10 Cir.) cert. den. 295 U. S. 767, and *Fulbright v. United States,* 91 F. 2d 210 (8 Cir.)[14] the statutes involved were constitutionally applied to petitioners; and (3) despite the variance between the indictment and the proof, and the "incomplete" charge on this point, the convictions could stand.

The petition for certiorari presented, and the case now presents, the following questions:

1. (a) Whether the arrests of petitioners Kremen and Coleman without warrant violated rights guaranteed to them by the Fourth, Fifth and Sixth Amendments to the Constitution; and (b) whether the searches of all three petitioners, the search of the house and the outhouse, and the seizure of all the books, papers and the other personal property therein—all without warrant—and the subsequent introduction into evidence against all petitioners of all the material so obtained, violated rights guaranteed to each of them by the Fourth, Fifth and Sixth Amendments to the Constitution.

2. Whether Sections 3, 371 and 1071 of Title 18 United States Code, or any of them, were unconstitutionally applied to all petitioners.

3. (a) Whether the indictment stated a crime against the United States; (b) whether the proof varied

[14]These opinions were not mentioned in the affirming opinions although they were cited to the court below in the briefs, and although *Fulbright* is referred to in the Chief Judge's dissenting opinion.

from the indictment, contrary to the requirements of the Fifth Amendment to the Constitution; and (c) whether the trial court, with the approval of the Court of Appeals, correctly instructed the jury on this subject.

STATEMENT.

The following is taken from that portion of the "Statement" in the government's brief filed in opposition to the petition for the writ, (pp. 2-8) insofar as it applies to these petitioners:

On October 22, 1953, a four count indictment was returned against petitioners. The first count charged petitioners with being accessories after the fact in violation of 18 U.S.C. 3, by receiving, relieving, comforting and assisting Robert G. Thompson, a convicted Smith Act (now 18 U.S.C. 2385) fugitive, knowing him to be such;[15] the second count charged all the petitioners with conspiracy to violate 18 U.S.C. 3. The third count charged the petitioners, except Steinberg, with violating 18 U.S.C. 1071, by harboring and concealing Steinberg, knowing that a warrant had been issued for his apprehension; the fourth count charged the petitioners (except Steinberg) with conspiracy to violate 18 U.S.C. 1071 (R. 3-8).

During the period charged in the indictment, both Thompson and Steinberg were fugitives from justice.

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[15] This is not quite correct. The indictment did not charge petitioners knew Thompson to be "a convicted Smith Act . . . fugitive". It charged only, and improperly as we shall show below, pp. 79-82, that petitioners knew that Thompson had been "convicted" of a violation of law. It did *not* charge that they knew he was a fugitive.

Thompson was a defendant in *Dennis*, a case receiving widespread news coverage, in which eleven leaders of the Communist Party were indicted, tried, and found guilty of conspiring to violate the Smith Act (R. 893). The judgment of conviction was affirmed by the Court of Appeals for the Second Circuit (183 F. 2d 201) and then affirmed by this Court in *Dennis v. United States*, 341 U. S. 494. Pending the appeal, Thompson had been admitted to bail. After his conviction had been affirmed, Thompson fled rather than surrender to serve his sentence, thereby forfeiting his $20,000 bail.[15a]

Petitioner Steinberg, together with 20 others, was indicted on June 19, 1951, by a grand jury in the Southern District of New York and charged with conspiracy to violate the Smith Act (R. 893). Sixteen of the persons charged in this indictment were apprehended shortly thereafter. Petitioner and three others charged could not be apprehended at that time.

Despite intensive efforts by the Federal Bureau of Investigation, both Thompson and Steinberg remained at large until their apprehension by agents of the Federal Bureau of Investigation on August 27, 1953, at a secluded cabin in the Sierra Nevada mountains near the small village of Twain Harte, California,[16] in the com-

[15a]The four *Dennis* defendants who failed to surrender after conviction are apparently the only ones who so behaved, despite the fact that scores of persons have since been prosecuted under the Smith Act. In February of this year the remaining fugitives voluntarily surrendered to serve their sentences. Cf. *United States v. Green*, 140 F. Supp. 117 (S.D.N.Y).

[16]A glance at any standard map of California will show that Twain Harte is on State Highway 108, one of the principal east-west highways crossing the Sierra Nevada, from the great California Cen-

pany of petitioners Kremen and Coleman (R. 201, 340, 421-422).

Thompson and petitioners Steinberg and Coleman were all long-time intimates. Thompson, Coleman and Steinberg had their offices in the same building, Communist Party headquarters in New York, at approximately the same time (R. 509-512, 516). Coleman and Steinberg were identified as being with or in the presence of Thompson on numerous occasions, including conventions and meetings (R. 519-523, 855-856, 857). At approximately the same time that Thompson and petitioner Steinberg became fugitives from justice, petitioner Coleman left his family and home (R. 609-615).

Petitioner Kremen, under the assumed name of Mrs. Lee Kaplan (R. 619, 621), rented the cabin near Twain Harte.[17] She specified she wanted "a spot where it would be quiet and rather secluded" (R. 620) for her "brother" (R. 620) who was "sick with nerves" (R. 620). In renting this particular cabin, she stated that she liked it because it was "very quiet" (R. 621).

Petitioner Steinberg identified himself as "Mr. Newberg", and petitioner Kremen as his "sister", to the owner of the cabin (R. 669-670). Steinberg seemed to be the host or household head at the cabin, extending

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tral Valley to Nevada. The town, in a heavily populated summer resort area, is but ten miles from Sonora, the county seat of Tuolumne County, and about 70 miles from the metropolitan city of Stockton, California.

[17]This, and most of what follows, became apparent to the agents only after the arrests. There was no evidence to suggest that it was known to them *prior* to the arrests.

an invitation to have breakfast to the owner, Mr. Germany (R. 669), and ordering Mrs. Kremen to pay Germany for a light bill (R. 671).

In the period preceding the arrest, petitioner Kremen made several purchases of large quantities of food (R. 682-683, 778-781). On one occasion, she and a man attempted to purchase hair dye (R. 683).[18] Mrs. Kremen also performed various household tasks for the occupants of the cabin and hired a repairman to fix the cabin pump (R. 194, 669, 695). In the company of Thompson and Steinberg, Mrs. Kremen purchased a pair of swim trunks "for a friend that was ill at the time" (R. 700-702).

It appeared at the trial that petitioner Coleman was with Thompson for some time prior to their apprehension. On June 5, 1953, Coleman purchased a Hudson automobile in St. Louis, Missouri, using the assumed identity of "William Gordon" (R. 548, 549).[19] The keys to this automobile were found in Thompson's pocket when he was apprehended (R. 430, 555, 558). Coleman (under the name of "Gordon") and Thompson were members of a party of four which rented boats at a resort in Camdenton, Missouri, on July 4, 1953 (R. 565, 576). In Bigfork, Montana, Thompson purchased a fishing license under the false name of "J. F. Brennan" (R. 596-597). Using their false names,

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[18]When apprehended, Thompson had dyed red hair and a moustache dyed red (R. 326). [Note: This and the following footnotes in this "Statement" are substantially from the government's brief in opposition, save when otherwise indicated.]

[19]Coleman stated he wanted the car "as soon as possible" and paid for it in cash (R. 549).

Thompson and Coleman stayed at a cabin some 30 miles from Bigfork from August 10 to August 17, 1953 (R. 601). They used a Hudson automobile with Missouri license plates on this trip (R. 602). The Hudson automobile purchased by "Gordon" in Missouri entered California on August 20, 1953 (R. 409-410, 412). Also, Coleman and Thompson were seen together in Twain Harte prior to their arrest (R. 701, 709).

Thirty minutes after positive identification of Thompson and petitioner Steinberg had been made on August 27, 1953, at Twain Harte (R. 197, 323-324), agents of the Federal Bureau of Investigation arrested Thompson and petitioners. At the time of the arrest, Thompson and Steinberg were in the clear area in front of the cabin, while petitioners Kremen and Coleman were inside the house (R. 201). It was apparent that Thompson and the petitioners had spent the night at the cabin and were well established there (R. 189, 192-195, 210-212; G. Exs. 14-18, A-1 through A-14)[20]. Both Thompson and petitioner Steinberg had altered their physical appearance considerably, so that they looked much different than they had when they became fugitives. Thompson had dyed his hair, gained much weight and had grown a mustache since he left New York (R. 325-326). Steinberg had cropped his hair short, had grown a mustache, and was much thinner both in face and body (R. 325). When apprehended, none of the occupants of the cabin had any visible means of sup-

[20]These exhibits were all seized *after* the arrest. Thus, what was "apparent" to the officers became so only after, not before, the search here assailed as unlawful. [This is our footnote, not the

port.[21] However, Thompson's wallet contained approximately $363 (R. 432) and approximately $450 was found in a belt on a chair in the cabin (R. 376-377).

The FBI agents made a search of the cabin and of the persons of the individuals apprehended at the time of the arrest.[22] Thompson and petitioner Steinberg had elaborate documentary proof of false identities and were using aliases. Thompson had no less than twelve documents identifying him as "John F. Brennan" (R. 432-434; G. Ex. 97). Steinberg admitted ownership of a wallet containing false identification in the name of "Joshua Newberg", supposedly a teacher of violin and mandolin (R. 331, 334-336). Other identification for "Joshua Newberg" was found in the cabin (R. 232; G. Exs. 23, 24, 25).

Petitioner Kremen's purse contained a library card, a fire permit, a Social Security card, an identification card, and an automobile operator's license, all in the name of "Lee Kaplan"; she also had some bills and an invoice containing the name of "Richard Kaplan" (R. 362-363; G. Ex. 86). False identification documents for "William Gordon", the name assumed by petitioner Coleman (R. 548, 549, 575-576), were found in a wallet discovered in the cabin (R. 899).

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[21]The relevancy of this observation escapes us. Most persons found in vacation resorts do not appear to have visible means of support. In any case, the government has not suggested that the arrests were justified because of the "apparent" commission of the misdemeanor of vagrancy. [This is our footnote, not the government's.]

[22]However, see n. 9, *supra*. And actually, the search of the cabin occurred substantially *after* the arrests (R. 215, 286, 289, 384-385). [This is our footnote, not the government's.]

After various pre-trial motions (R. 18, 21, 22) for suppression and return of property found at the cabin at the time of arrest had been disposed of,[23] the trial commenced. Following the impaneling of the jury, petitioners apparently made another motion to suppress (R. 163, 183) which was denied on April 13 (R. 73). During the trial, petitioners made motions to suppress on the grounds that the search was "illegal and improper" (R. 202, 204, 216, 217, 219, 220, 228, 231, and various other times throughout the trial). These were all denied.

The foregoing summary of the evidence taken from the government's brief in opposition, neglects to mention a factor of prime significance with relation to the questions presented because of the absence of arrest or search warrants, i.e., that preparations for the arrests began *at least* 72 hours prior to the raid. Thus, the record shows (1) that agents were dispatched from New York City in time to be in San Francisco on August 25, 1953, and to participate in the raid two days later (R. 352, 438); (2) that two days before the raid, agents left San Francisco for the Twain Harte area, carrying photographs and fingerprints of Thompson and Steinberg (R. 537); (3) that the next day additional agents left San Francisco to participate in the raid, but without any photographs or fingerprints of

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[23]Petitioners' motion of February 8, 1954, was denied on the ground that petitioners did not allege any interest in the property found on the premises searched (R. 26-28); petitioners' motion of April 5, 1954 was taken off the calendar by stipulation (R. 73).

petitioners Kremen or Coleman (R. 273-274); (4) that at least 24 hours before the raid, agents had petitioners and Thompson under surveillance (R. 525) but observed only "normal activities" (R. 117-120, 195); (5) that a constant vigil was maintained for the last 8 hours before the arrests (R. 133, 271); (6) that during all this time an elaborate two-way communication system had been set up (R. 197); (7) that surveillance through the use of a private electric company truck had been arranged (R. 533-534); and (8) that a matron had been dispatched to the scene (R. 275-276).

Obviously preparations for the raid were carefully made in advance and everything was done to assure its success. But at no time during this period, which was at least 72 hours long, did any agent of the Government apply to a United States Commissioner or Judge for arrest or search warrants. They did everything, but this one simple act of obeisance to the Constitution of the United States.

The government's statement also omits to mention the fact that about a week after the arrests (five days, to be exact) an FBI agent returned to the scene and, in the absence of petitioners and without their consent, conducted a search without warrant, of an outhouse and procured from a garbage can located therein evidence (fingerprints on beer cans) which was used against petitioners.

SPECIFICATION OF ERRORS.

The court below erred in holding:

1. That the arrests of petitioners Kremen and Coleman without warrant, and their subsequent prosecution, did not violate rights guaranteed to them by the Fourth, Fifth and Sixth Amendments to the Constitution; and that searches of all petitioners and the house and outhouse, and the seizure of all the books, papers and other personal property therein—all without warrant—and the subsequent introduction into evidence against all petitioners of the material so obtained, did not violate rights guaranteed to all of them by the Fourth, Fifth and Sixth Amendments to the Constitution.

2. That Sections 3, 371 and 1071 of Title 18 of the United States Code, or any of them, were constitutionally applied to petitioners here.

3. That the indictment stated a crime against the United States; and that the variance between the indictment and the proof, as well as the "incomplete" instruction on this point, did not require a reversal of the conviction of petitioners in the face of the requirements of the Fifth Amendment to the Constitution.

SUMMARY OF ARGUMENT.

I

(A) The arrests of petitioners Kremen and Coleman without warrant violated rights guaranteed to them by the Fourth Amendment, which protects against unreasonable arrests as much as it does against unreasonable

searches and seizures. *United States v. Rabb,* 141 F.2d 45 (3 Cir.); *Wrightson v. United States,* 222 F.2d 556 (D.C. Cir.) Cf. *McGrain v. Daugherty,* 273 U.S. 135, 156; *United States v. Di Re,* 322 U.S. 581, 595.[24]

There was ample time before the arrests to procure the necessary warrants. F.R.Crim. Pro., Rule 4. There was no such "likelihood" of escape as is required in the case of the citizen's arrest authorized by 18 U.S.C.A. 3052. Cf. *Coplon v. United States,* 185 F.2d 629 (2 Cir.), cert. den. 342 U.S. 920. In any case, there was no such emergency as was presented in *Carroll v. United States,* 267 U. S. 132, or *Brinegar v. United States,* 338 U.S. 160, to justify a disregard of the Constitution, the statute or the rule regulating the procedure to be followed in the procurement of arrest warrants (*Wrightson v. United States,* 222 F.2d 556 [D.C. Cir.]).

The record does not support the claim that the arrests were justified on the theory that these petitioners were committing a felony in the presence of the officers. All of the evidence shows that they were doing nothing whatsoever to excite any suspicion. The mere fact that they were in the presence of fugitives does not justify the arrests. *Fulbright v. United States,* 91 F.2d 210 (8 Cir.).

(B) The search and seizure violated the constitutional rights of all petitioners. In the absence of a warrant, searches are condemned unless they fall within

[24]By the generalized introduction of the evidence thus obtained, their rights, as well as the rights of the petitioner Steinberg under the Fifth Amendment, were also violated. *McDonald v. United States,* 335 U. S. 452; *United States v. Thomas,* 113 F. 2d 643 (7 Cir.).

one of two narrowly circumscribed exceptions: (a) if they are incidental to a valid arrest, or (b) if the facts present "special circumstances" warranting a by-passing of the constitutional requirement. *United States v. Jeffers,* 342 U.S. 48. The record here reveals that the government has not discharged its heavy burden (*McDonald v. United States,* 335 U.S. 451) of establishing that this case is embraced within either of these exceptions.

The only possibly valid arrests were those of Thompson and Steinberg *outside the premises.*[25] These arrests did not justify the subsequent search of the *interior* of the house, of the persons of Kremen or Coleman, of the automobiles or the outhouse, because those searches were not "incidental" to those arrests in terms of time, place or purpose. *Agnello v. United States,* 269 U.S. 20; *Baxter v. United States,* 188 F.2d 119 (6 Cir.); *Steeber v. United States,* 198 F.2d 615 (10 Cir.). None of the arrests—even including those of Coleman and Kremen—justified, or could conceivably justify, the search of the outhouse five days later. Especially does the purpose of the searches—rummaging, exploratory attempts to procure evidence—condemn them as violative of petitioners' constitutional rights. *Go-Bart Importing Co. v. United States,* 282 U.S. 344; *United States v. Lefkowitz,* 285 U.S. 452.

There was no emergency which justified the by-passing of the constitutional requirement to obtain a search

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[25]As to the arrests of Coleman and Kremen, see *supra* I(A).

warrant. *Johnson v. United States,* 337 U.S. 10; *McDonald v. United States,* 335 U.S. 451. This was not a case of persons illegally carrying concealed contraband in swiftly moving vehicles or on public highways, like *Carroll v. United States,* 267 U.S. 132, or *Brinegar v. United States,* 338 U.S. 160. Nor is there here any legislative authority which might have given a stamp of reasonableness to the officers' conduct, as there was in the *Carroll* case. Here there was merely the naked assertion of authority to search without warrant in the face of 18 U.S.C.A. 3107, which empowers agents of the FBI to make seizures "under warrant", and of F. R. Crim. Pro., Rule 41, which prescribes how a warrant may be obtained. Neither of these was followed. There was no evidence of imminent flight, which could have justified the action of the officers, and in any case, there were available constitutional methods to cope with the situation. *United States v. Jeffers,* 342 U.S. 48; *Coplon v. United States,* 185 F.2d 629 (2 Cir.), cert. den. 342 U.S. 920.

II

(A) The multiple charges upon which petitioners were convicted (harboring, accessoryship and conspiracy) represented a pyramiding of the offenses against them for what was at most a single criminal offense. The separate crimes charged did not require the proof of facts not essential to each other. *Perreira v. United States,* 341 U.S. 1; *Gebardi v. United States,* 287 U.S. 112; cf. *Braverman v. United States,* 317 U.S. 49; *United States v. Universal C.I.T. Credit Corp.,* 344 U.S. 218. Therefore petitioners were placed in double jeop-

ardy by the multiplicity of their convictions and the consecutiveness[26] of their sentences.

(B) At common law, and under the federal statutes which adopt the common law rule (*Skelly v. United States,* 76 F.2d 483 [10 Cir.] cert. den. 295 U.S. 757; Reviser's Note to 18 U.S.C.A. 3), post-conviction aid did not constitute the crime of accessoryship after the fact. Here that was the only type of aid rendered and while petitioners might conceivably have committed other crimes, they did not violate, and could not have violated, 18 U.S.C.A. 3—the accessoryship statute. The common law rule was preserved in the 1948 codification (cf. 18 U.S.C.A. 751, *et seq.,* and 1071, *et seq.,* with 18 U.S.C.A. 3), and remain the law today. While Congress might have changed that law, it did not do so. Petitioners were therefore improperly convicted under the first and second counts of the indictment.

(C) There was not the necessary proof that petitioners knew of the existence of federal process outstanding for the fugitives and intended to thwart it (cf. *Fulbright v. United States,* 91 F.2d 210 [8 Cir.]), and their convictions were therefore not justified. The "suspicious circumstances" surrounding their arrests are no legal substitute for such proof. Nor may adverse inferences be raised against them because of their failure to rebut the suspicions engendered by their mere presence at the same place as the fugitives. *Tot v. United States,* 319 U.S. 463; cf. *Maggio v. Zietz,* 333 U.S. 56. The past associations of some petitioners with

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[26]Or in petitioner Kremen's case, the excessiveness.

Thompson in the Communist Party do not justify any inference of their guilt. Cf. *Wieman v. Updegraf*, 344 U.S. 183.

III

(A) Counts 1 and 2 (the accessoryship count and its conspiracy counterpart) did not allege facts sufficient to constitute an offense against the United States. By charging that Thompson had been convicted of conspiring to "overthrow" Government and alleging that that offense was in violation of cited sections of the Smith Act which does not cover such an offense, the indictment was fatally defective by reason of inconsistency. At least it was so confusing and self-contradictory as to render it invalid. Such an indictment does not meet the constitutional tests of advising petitioners with certainty of the crime charged or of permitting them to plead this conviction as a bar in the future. *Cruikshank v. United States*, 92 U. S. 542.

(B) There was a fatal variance between the allegation that Thompson had been convicted of conspiring to overthrow government and the proof which showed that the conspiracy of which he had been convicted was one to "teach and advocate" certain noxious doctrines. While this proof might have supported a conviction against petitioners for accessoryship after the fact (apart from the question of its inadequacy in other respects, *supra* II [C]) to the offense of conspiring to teach and advocate, that was not the offense charged. Conviction, therefore, upon an offense not charged, violated petitioners' constitutional rights. *DeJonge v. Oregon*, 299 U. S. 353; *Cole v. Arkansas*, 333 U. S. 196.

(C) The charge to the jury that "as a matter of law" the proof showed Thompson to have been convicted of the crime charged was erroneous as clearly contrary to the record. At the very least, it was so equivocal in its failure to state what "the said crime" was or which was "the crime therein described" as to require a reversal of the judgment of conviction. *Bollenbach v. United States*, 326 U. S. 607.

ARGUMENT.

I.

THE ARRESTS OF PETITIONERS KREMEN AND COLEMAN WITHOUT WARRANT VIOLATED THEIR CONSTITUTIONAL RIGHTS; THE SEARCHES OF ALL PETITIONERS AND OF THE PREMISES, AND THE SEIZURE OF THE BOOKS, PAPERS AND EFFECTS, ALL WITHOUT WARRANT, AND THE SUBSEQUENT INTRODUCTION OF THIS EVIDENCE AGAINST ALL PETITIONERS, VIOLATED THE CONSTITUTIONAL RIGHTS OF ALL PETITIONERS.

(A) THE ARRESTS OF PETITIONERS KREMEN AND COLEMAN WITHOUT WARRANT VIOLATED THEIR CONSTITUTIONAL RIGHTS.

Whatever may be the situation as to petitioner Steinberg,[27] it is clear that there was no justification for the arrests of petitioners Kremen and Coleman. The government, conceding that no warrants were ever issued for the arrests of these petitioners (R. 100), seeks to

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[27]The record shows that while a bench warrant had been issued for Steinberg's arrest by the District Court for the Southern District of New York in July of 1951 (Ex. 122; R. 901), the arresting officers did not have it in their possession at the time of the arrest (R. 348-9, 439-40).

justify those arrests on the ground that there was probable cause to believe that a felony—being accessory after the fact—was being committed by these petitioners in the very presence of the arresting officers (Br. in Opp. 10).

But the record utterly fails to support such a contention. For the twenty-four hours that petitioners were under surveillance,[28] the officers never observed either of these petitioners (or indeed anyone else) commit an act which could reasonably be said to arouse even a suspicion that a crime had been or was being committed. According to the testimony of the agents, all that was observed during this period was normal movement about the premises.[29] The only "evidence" in the

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[28]From 2:35 p.m. on August 26 (R. 525) until 1:05 p.m. on August 25 (R. 200-201). See also R. 123.

[29]"THE COURT: Q. You have already said that you saw two of them in the yard and they were standing there and had play clothes on.

Now, did you see these two defendants before you had gone to the others do anything further?

THE WITNESS: A. Nothing except come out of the house." (R. 118).

* * * * *

"Q. . . . During that period that you had them under surveillance, what if anything did you observe them do? A. They were in the yard there talking together.

Q. Anything else? A. Roaming around together, came out of the house together.

Q. You saw nothing else? A. Nothing else that I recall." (R. 119).

* * * * *

"Q. You say that your agents were reporting to you from 6 a.m. that day? A. Yes, sir.

Q. What they observed and what they saw? A. Yes, sir.

Q. What did they tell you they saw the defendant Shirley Kremen do, if anything? A. I don't recall that they reported anything during that period.

agents' possession *before*[30] the arrests was a belief that the petitioners were "all living together" (R. 117)[31] and it is on this basis, and on this basis only, that the arrests of Kremen and Coleman must be justified. Thus the government is forced to contend that the mere presence of petitioners Kremen and Coleman in the same house with the fugitives is enough to justify their arrests.[32] But the law is clearly to the contrary (*infra*, p. 33-35).

Q. The same question as to the defendant Coleman; what is your answer? A. I don't recall that they reported anything." (R. 132-33).

* * * *

"Q. . . . What had been the general nature of the activity of the other persons that you had seen . . .? A. They came out as I would say people would normally come out of a place and talk among each other, relax on their various terraces or in chairs . . ." (R. 195).

[30]The evidence recited by the government in its Brief in Opposition (*supra*, pp. 14-16) respecting the rental of the cabin by Kremen, the purchase of food, etc., the traveling together of Coleman and Thompson, was obviously not known to the officers at the time of the arrests and was not the result of the surveillance which led to the arrests. This evidence was all developed *after* the arrests and obviously from investigations initiated on the basis of information obtained during the course of the unlawful search and seizure. See, e.g., R. 642-3; 782; 571; 580; 692; 707.

[31]Actually, this conclusionary testimony of the agent was stricken by the trial court (R. 117-118) and, in his subsequent answer, the witness made it clear that he must have reached this conclusion *after* the arrests when he had an opportunity to inspect the house which "looked like it was lived in". (R. 118).

[32]Indeed the inescapable logic of the government's position is that the agents would have been justified in arresting *anyone* who had been found in the presence of the fugitives—including the realtor who might have come up to collect rents, or even a casual guest. To say that such a person would have been released when subsequent investigations established his "innocence" is to reveal the illegality of the initial arrests, which the law requires to be justified by what the officers knew before or at the time of the arrest, and not by what they learned afterwards. *United States v. Di Re*, 332 U.S. 581, 595; cf. *Byars v. United States*, 273 U.S. 28, 29.

In any case, there was absent any "likelihood" of escape, an element also required by 18 U.S.C.A. 3052 before an arrest without warrant may be made by an FBI agent.[32a]

1. The principles against which the lawfulness of the arrests must be tested.

a. The Fourth Amendment.

Although the Fourth Amendment has been invoked most frequently in cases involving unreasonable searches and seizures, it is clear that its guarantees are equally applicable to unreasonable arrests. *Worthington v. United States,* 116 F.2d 557, 562 (6 Cir.); *Wrightson v. United States,* 222 F.2d 556, 59 (D.C. Cir.); cf. *Albrecht v. United States,* 273 U.S. 1, 5; *McGrain v. Daugherty,* 273 U.S. 135, 156; *United States v. Di Re,* 322 U.S. 581, 595; *United States v. Rabb,* 141 F.2d 45 (3 Cir.).[33] Thus, the standards which have developed in the cases to test the reasonableness of a search or seizure under the amendment, may be properly considered in the determination of whether an arrest is subject to the condemnation of the amendment.

[32a]The powers of FBI agents in this regard are considerably more circumscribed than are the powers of federal marshals and their deputies. Cf. 18 U.S.C.A. 3053 which does not impose the additional requirement of "likelihood" of flight upon arrests made without warrants by marshals.

[33]"The history and development of the Fourth Amendment show that it guarantees the right of the individual to be secure in his person against unreasonable arrests, as well as against unreasonable searches of houses and seizure of papers and effects. See 'The History and Development of the Fourth Amendment to the United States Constitution', Lasson, Series LV No. 2 of the Johns Hopkins University Studies in Historical and Political Science, 1937, and in particular pp. 35, 95, 117 and 132 and the authorities and notes cited therein." (*United States v. Rabb,* 141 F. 2d at 46, n. 1).

We discuss those standards below at pages 37 to 57. We submit here that the application of such standards to the facts revealed by this record, requires that the arrests of petitioners Kremen and Coleman be stricken down as unreasonable and therefore as contrary to the provisions of the Fourth Amendment; their convictions therefore must be reversed.

b. The rules and the statute.

In any case, the federal rules and statute prescribe with particularity the circumstances under which arrests may be made. Tested by the requirements of those rules and statutes, these arrests cannot stand.

(1) The rules.

The rules require that before an arrest warrant issue, there be a showing by a complaint "upon oath" (F.R.Crim.Pro., Rule 3) that "there is probable cause to believe that an offense has been committed and that the defendant has committed it . . ." (F.R.Crim.Pro., Rule 4). That, of course, was not done here: at least so far as petitioners Kremen and Coleman are concerned.

These rules, it has been said, go to the "very heart of due process of law, and, more directly [to] the essence of the Fourth Amendment" (*Wrightson v. United States,* 222 F.2d 556, 558. (D.C. Cir.). They require a "factual showing that the officers at the time of the arrest had probable cause to believe" that the defendants had committed the crime (*Ibid.,* at 560). In the absence of such a "factual showing" by the officers, the arrest is invalid. No such showing was, or

could have been, made here with respect to petitioners Kremen and Coleman.

(2) The statute.

While the statute (18 USCA 3052) permits agents of the Federal Bureau of Investigation to make arrests without warrant "... for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony" *and* if there is a "likelihood" of escape, the safeguards surrounding such arrests are no less than those required to be observed in order to obtain a warrant (cf. *Wrightson v. United States, supra,* at 559); and the same "factual showing" is therefore required in the case of an arrest without warrant as is required to obtain a warrant.

In making an arrest without warrant, the arresting officer must, before the arrest, have personal knowledge of evidence which would be competent and admissible on a trial and which, if submitted to a magistrate, would be sufficient to justify the issuance of a warrant. *Worthington v. United States,* 162 Fed. 2d 557 (6 Cir.); cf. *Johnson v. United States,* 333 U.S. 10, 15.

In *Coplon v. United States,* 185 Fed. 2d 629 (2 Cir.) cert. den. 342 U.S. 920, the Court concluded, from a review of the legislative history of Section 3052, that "Congress has always been grudging in its grant of this power [to arrest without warrant] to the Bureau ..." (185 Fed. 2d at 635), and that the statute conferred

upon agents of the Bureau no greater authority to arrest without warrant than is possessed by "private persons in any state in which they acted" (Ibid., at 634).

In California, where these arrests took place, the statute permits private persons to make arrests without warrant only for "a public offense committed or attempted in his presence", or "when a person arrested has committed a felony", or "when a felony has been in fact committed, and [the person making the arrest] has reasonable cause for believing the person arrested to have committed it". (California Penal Code, §837.) The California cases require that one making such an arrest be able to testify of his own knowledge to sufficient facts to show that the case comes within the purview of statute. *People v. Craig,* 152 C. 42, 46; *People v. Yee,* 145 A.C.A. 607 (Calif.); *People v. Brite,* 9 C.2d 666, 668.

2. Tested by the foregoing principles, the arrests were invalid.

Substantially, what the legislation just considered requires is that when an arrest is made without a warrant, the arresting officer have, *at the time of the arrest,* sufficient personal knowledge, reasonably to justify a belief that an offense has been committed and that the person he is arresting has committed it.

As to appellants Kremen and Coleman, the record is barren of any intimation that the officers had or could have had such personal knowledge. Indeed, the officers did not even know the identity of Kremen and Coleman before the arrests were made (R. 273-274), and all of

the information which they secured concerning those petitioners, save the fact that they were in the presence of the fugitives, was developed as a result of the search which occurred *after* the arrests.

Thus, here, as in *Johnson v. United States,* 333 U.S. 10, "the government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest" (333 U.S. at 16). As this Court said there:

> "This will not do. An officer gaining access to private living quarters under the color of his office and the law which he personifies *then* must have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police state where they are the law." (333 U.S. at 17; italics added)

Nor will it do to suggest, as the government does (Br. in Opp. 10), that because petitioners Kremen and Coleman were in the presence of the fugitives, the officers had probable cause to believe that these petitioners were accessories after the fact to Thompson's offense.[34] The law is clear that more is required to make out

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[34] A similar contention was rejected by this Court in *United States v. Di Re,* 332 U.S. 581 where it was said: "Presumptions of guilt are not likely to be indulged from mere meetings . . . Any inference that anyone on the scene of a crime is a party to it must disappear if the government informer singles out the guilty person" (332 U.S. at 593-594). Here the government agents singled out Thompson and Steinberg as the fugitives (R. 197, 323) and any inference that the others at the scene were a party to the crime must therefore disappear.

accessoryship than merely being in the presence of the fugitive.

> "General malevolence is not enough if the specific knowledge required by the statute is lacking (8 Cir.)." *Fulbright v. United States,* 91 F.2d 210.

Cf. also *United States v. Perlstein,* 126 F.2d 789 (3 Cir.); *United States v. Ausmeier,* 152 F.2d 349 (2 Cir.); and see *United States v. Pincourt,* 159 F.2d 917, 920 (3 Cir.).

In *Fulbright, supra,* it was held that

> "Knowledge that the fugitives were evading officers in general or that a state government had issued warrants for their arrest is immaterial. Such acts are beyond the purview of the statute . . . Every circumstance pointed out is consistent with knowledge that [the fugutives] were criminals, but it is equally consistent with appellant's ignorance of outstanding warrants for their arrest." (91 F.2d at 213-214)[35]

The government conceded, indeed it argued, on the trial, that "absolutely necessary" to its case was proof "that the defendants knew Robert Thompson had committed an offense" (R. 849-850); and it has, inferentially at least, here admitted that *scienter* or "mental state" is an essential element of the accessoryship offense (Br. in Opp. 14).

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[35]The government's suggestion (Br. in Opp. n. 16) that petitioners' reliance on *Fulbright* is "misplaced", since "petitioners failed to introduce any evidence" as to why Thompson and Steinberg were being "hidden", lacks merit for two reasons. First, it assumes the very fact at issue: that the fugitives were being "hidden". Second, it seeks to transfer to petitioners the burden of proving their innocence, rather than leaving the burden of proving their guilt where it belongs—on the prosecution.

Clearly there is no evidence in this record which would justify a finding that any officer had, prior to the arrests, observed anything upon which he could have based a reasonable belief that petitioners Kremen and Coleman had the requisite mental state or *scienter*. Certainly there is no evidence which resulted solely from the pre-arrest surveillance to show that either of these petitioners had any guilty knowledge or intent. *United States v. Di Re,* 332 U.S. 581, 592. Thus in the absence of any evidence which would afford the foundation for a reasonable belief that these two petitioners were in fact committing the felony of accessoryship, their arrests, based merely on their presence at the cabin, were unlawful.

In any case, the provisions of 18 U.S.C.A. 3052 apply only when there is a "likelihood" of escape. The statute requires *both* reasonable grounds to believe that a felony has been committed *and* reasonable grounds to believe that there is a likelihood of escape. Thus, even if the argument heretofore made, that there were no reasonable grounds to believe that a felony had been or was being committed, is held inapplicable, there still must be a showing that there were reasonable grounds to believe that flight was likely. The evidence, summarized above, relating to the conduct of petitioners at the cabin demonstrates that there were no grounds whatsoever for such a belief. Indeed no officer ever asserted that he had such a belief. The arrests, therefore, were invalid and cannot justify the subsequent searches.

The government relies (Br. in Opp. 9-10) on *Brinegar v. United States,* 338 U.S. 160, and *Carroll v.*

United States, 267 U.S. 132, to justify these arrests. However, those cases afford no support for its position here. Regarded as they were by this Court as being very close to the borderline and decided over vigorous dissents, they presented factual situations far removed from that at bar. They dealt not with claimed infringements of constitutional rights by reason of arrests in "the house or other place of privacy . . ." as does this case; to the contrary, they dealt only with a claim of "freedom to use public highways in swiftly moving vehicles for dealing in contraband, and [a claim] to be unmolested by investigation and search in such movements" (*Brinegar v. United States,* 338 U.S. 176, 177). Their holdings were limited to the precise facts which they presented. It clearly was not contemplated even by the narrow majorities deciding them, that these cases would justify the arrests without warrant of persons pursuing normal and apparently peaceful activities at their homes "or other place[s] of privacy". The government has cited no good reason for extending the holdings of cases dealing with the arrests of persons using swiftly moving vehicles to transport contraband along public highways to the facts of this case.

If these petitioners—just because some of them later turned out to be "Communists"—were not free of arrest without warrant in their summer home, then no American similarly situated is.[36]

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[36] ". . . the right of every American to equal treatment before the law is wrapped up in the same constitutional bundle with those of these Communists. If in anger or disgust with these defendants we throw out the bundle, we also cast aside protection for the liberties of more

The unlawful arrests of petitioners Kremen and Coleman must lead to a reversal not only of their convictions, but, since that unlawfulness also destroys the only basis upon which the government seeks to justify the subsequent search and seizure without warrant, it therefore invalidates the conviction of Steinberg as well. The searches of all three petitioners, the indiscriminate seizure of their papers and effects, and the introduction of the whole mass into evidence against all of them, requires a reversal of all the convictions. For the fruits of the illegal arrests of Kremen and Coleman were used against Steinberg, too. "All [the] evidence" was offered by the government "against all defendants" (R. 901) and was so received by the trial judge (R. 75). Evidence which is tainted by the illegality of the arrests of Kremen and Coleman, was used to convict Steinberg. In such a case the constitutional guaranty is extended to all and no fine distinctions will be drawn to exclude any from its protection. *McDonald v. United States,* 335 U.S. 452; *United States v. Thompson,* 113 F.2d 643 (7 Cir.). Steinberg, too, is therefore entitled to a reversal of the judgment against him.

(B) THE SEARCHES OF ALL PETITIONERS AND THE PREMISES AND THE SEIZURE OF THEIR BOOKS, PAPERS AND EFFECTS, ALL WITHOUT WARRANT, VIOLATED THEIR CONSTITUTIONAL RIGHTS.

1. The facts of the search.

As we have already seen, preparations for the "raid" began sometime prior to August 25, 1953. (R. 395, 529).

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worthy critics who may be in opposition to the government of some future day" (Mr. Justice Jackson, as Circuit Justice, in *Williamson v. United States,* 184 F. 2d 280, 284 [2 Cir.]).

Thus two FBI agents, who, through previous surveillance could have been expected to identify Steinberg and Thompson, left New York City in plenty of time to arrive in San Francisco on August 25 and to participate in the arrests of all petitioners two days later (R. 352, 438). On August 25 at least three FBI agents left San Francisco for the Twain Harte area bearing photographs of Thompson and Steinberg (R. 537). Between 4 and 5 p.m. on August 26, five more FBI agents left San Francisco to participate in the arrests which took place the next day (R. 273).

From 2:35 p.m., August 26 (R. 525) until the time of the arrests at 1:00 p.m. on August 27, FBI agents had the premises under surveillance (R. 195). From 5:00 a.m. on August 27 until the arrests eight hours later, a group of five FBI agents maintained a constant vigil there from vantage points on a nearby hillside (R. 133, 271). There is no evidence to indicate that anyone on the premises was seen doing anything except normally moving about the premises (R. 117, 119-120, 195).

For at least seven hours these agents were in communication with the agent in charge of the operation via a two-way radio, relaying information and receiving instructions (R. 197). There were no reports from the observing agents to their superior that anyone was doing anything except walking about, conversing and engaging in normal activities (R. 133).

At about 12:45 p.m. that afternoon, the agents received instructions to stand by to assist a party of FBI agents who would soon approach by automobile (R. 197-

198) to effect the arrest of Thompson and petitioners. Simultaneously with the arrival of six automobiles (R. 95) containing fifteen or sixteen agents and a matron,[37] the agents stationed on the hillside converged upon the dwelling (R. 200, 274). As the raiding party descended upon the house with drawn guns, the agent in charge announced that the members of the arresting group were from the FBI.

Thompson and petitioner Steinberg were arrested outside the house (R. 96). While neither of them was served with a warrant (R. 349, 439), they were told that they were under arrest for violations of the Smith Act (R. 329, 342). Petitioners Kremen and Coleman were arrested inside the house (R. 97). There were no warrants for their arrest (R. 100).

There were no efforts to avoid submission to or to prevent arrest, nor were there any efforts to escape (R. 277). No weapons were found (R. 107).

Petitioner Kremen's person was searched by the matron inside the house. Eventually Kremen and Coleman were taken out into the yard with Thompson and Steinberg and told they were under arrest for harboring (R. 101). In the yard, all except appellant Kremen were subjected to personal search, fingerprinted, photographed and handcuffed (R. 101-102).

While the arrested persons were held outdoors, agent Erickson searched all the rooms and the closets in the

[37] Arrangements had been made to bring along a matron (R. 275-276), indicating, as does everything else discussed above, that the agents had knowledge, in ample time to secure warrants, of the fact that they were going to make arrests. Cf. *United States v. Coplon*, 185 F.2d 629, 635 (2 Cir.), cert. den. 342 U.S. 920.

entire house (R. 210-212). He read and examined papers and documents from boxes, suitcases, brief cases and desk drawers located in different rooms in the house (R. 210-212, 288, 312). Then he went outside to two automobiles located in the parking area and searched them (R. 212).

In the absence of the prisoners, who had been driven to San Francisco for arraignment, there was a mass seizure and removal of ". . . whatever was there . . ." (R. 103), of "everything . . . except that which the realtor handling the house identified as the property belonging to him" (R. 286).

Agent Erickson took personal charge of the boxes and suitcases containing papers, and drove them to San Francisco for a more detailed study and search (R. 215, 289). Other agents seized and removed hundreds of items listed in exhaustive detail on the 25-page inventory already referred to (Ex. A; R. 109), and transported them in bulk to San Francisco. A belt containing money and two bill folds with their contents were removed from trousers found in the living room (R. 378-379). Papers were removed from a desk in the same room (R. 374-375). Four or five FBI agents remained on the premises until midnight, August 27 (R. 390).

Five days later, on September 2, 1953, an agent returned to an outhouse and secured fingerprints from beer cans in a garbage can (R. 384-387).

No search warrant of any kind was sought or secured prior to the search and seizure conducted on August 27, or prior to the search on September 2, or at any other time (R. 105-106, 404).

The principal objects of the search were the papers and documents found in the dwelling (R. 213). The great bulk of the exhibits presented by the government were secured as a result of these searches (R. 297), and the bulk of the government's evidence came from leads developed from its examination of these documents (see n. 30, *supra*). The unlawfulness of this search was timely raised by motion (R. 22-23) and was supported by testimony offered in the course of the hearing on the motion (R. 89-138, 164-180). Objections to the introduction of the illegally obtained evidence were pressed throughout the trial (R. 202, 204, 216, 217, 219, 220, 228, 231).

2. The constitutional principles applicable to the searches.

At this late date it should require no great collection or citation of authorities to demonstrate that the protection against unreasonable searches and seizures contained in the Fourth and Fifth Amendments "affect the very essence of constitutional liberty and security" (*Boyd v. United States,* 116 U.S. 616, 630 [referring to Lord Camden's opinion in *Entick v. Carrington,* 19 How. St. Tr. 1029]), and are as important to the maintenance of the American constitutional system as are the other great guarantees of individual liberty—right to trial by jury, habeas corpus, and due process. *Gouled v. United States,* 255 U.S. 298.[38]

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[38]The *Boyd* opinion, *supra*, contains a scholarly review of the history of the amendments and demonstrates how the concepts they embody resulted from the struggle both in England and the colonies against the despotic "writs of assistance", which were being employed by an authoritarian state to crush the liberties of the peoples. (116

The amendments therefore are not to be "narrowly or begrudgingly applied" (cf. *Quinn v. United States*, 349 U.S. 155, 162), rather they are to be "liberally construed to prevent impairment of the protection extended" (*Grau v. United States*, 257 U.S. 124, 128). Their effect is to put all federal officers under their restraints to the end that the people will be forever secure in the rights which they guarantee. Their protection reaches all, those who are accused of crime as well as those who are not, and the duty of giving full effect to their provisions falls upon all those entrusted with the enforcement of the federal law. *Weeks v. United States*, 232 U.S. 383, 391-392.

3. Tested by the foregoing principles, the searches were invalid.

The salutary policy of the amendments condemns a search without a warrant unless it is "incident to a valid arrest" or unless the search can be justified by "special circumstances." *United States v. Jeffers*, 342 U.S. 48, 51. In making a claim that a case falls within either of these two exemptions, the government is required to discharge a heavy burden. *McDonald v. United States*, 335 U.S. 451. It has not done so here.

U.S. at 625-631). See also *Weeks v. United States*, 232 U.S. 383; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385; *United States v. Lefkowitz*, 285 U.S. 452; *Go-Bart Importing Co. v. United States*, 292 U.S. 344; *Davis v. United States*, 328 U.S. 582; *Johnson v. United States*, 333 U.S. 10; *McDonald v. United States*, 335 U.S. 451.

The fact that the constitutions of the several states "uniformly" impose restraints on state action as to searches and seizures which are "identical with or similar to" those imposed on federal action by the federal constitution (47 Am. Jur., Searches & Seizures, 58) demonstrates the pervasiveness of these concepts in the American constitutional system. See *Agnello v. United States*, 269 U.S. 20, 33. The state cases are collected in 47 Am. Jur., *supra*, 507, n. 6.

We have already shown why, as to petitioners Kremen and Coleman, there was no valid arrest. Assuming, however, that there was a valid arrest of Thompson or of petitioner Steinberg outside the house, that fact alone gives no justification for the search of the remaining petitioners or of the house, the automobiles, or the outhouse.

a. The searches do not fall within the narrow scope of the "incident to arrest" exemption.

A search based on the "incident to arrest" theory must be genuinely incidental to the arrest. The vitality of the constitutional amendments would be wholly sapped if a search such as was here conducted were upheld merely because there had been a valid arrest. For this reason, this exception has been closely hedged about by limitations and conditions which impose rigid requirements respecting the place, the time, and the purposes of searches alleged to be incidental to arrests.

(1) The Place

Ever since the decision in *Agnello v. United States*, 269 U.S. 20, the explicit rule[39] has been that a search of a dwelling is incidental to a valid arrest only where the arrest occurred inside the dwelling house. Mr. Justice Butler, speaking for the Court in that case, said:

> "... one's house cannot lawfully be searched without a search warrant, except as an incident to a law-

[39]The rule was clearly implicit in the earlier cases. *Boyd v. United States*, 116 U.S. 616; *Weeks v. United States*, 232 U.S. 383; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385; *Gouled v. United States*, 255 U.S. 298.

ful arrest *therein.*" (296 U.S. at 32; italics added.)

The history of the amendments to which we have already adverted (*supra,* notes 33, 38) makes it clear that it was the unauthorized search of the private citizens' home which was the chief evil sought to be remedied. For this reason it has been held that the search of a private dwelling without warrant is "in itself" unreasonable and abhorrent to law. *Agnello v. United States,* 269 U.S. 20; *Papini v. United States,* 84 F. 2d 160 (9 Cir.); *Worthington v. United States,* 166 F. 2d 557, 562 (6 Cir.). It is precisely in cases where there has been a search of a private dwelling without warrant that the burden of showing "special circumstances" is thrust most heavily upon the government. *McDonald v. United States,* 335 U.S. 451, 456; *United States v. Jeffers,* 342 U.S. 48, 51.[40]

In *Baxter v. United States,* 188 F. 2d 119 (6 Cir.) officers had received information, some six hours before the arrests, that an appellant was storing whiskey in his house. Without securing a warrant, they went to the premises and stationed themselves in a nearby field from which they observed a truck being loaded with cartons taken out of the house. After one of the cartons was dropped and the officers smelled whiskey, they arrested one appellant at the rear of the truck. Then they entered the house, arrested the other appellant therein

[40] Where a dwelling is searched without a warrant the court will examine the record with greater care than when a place of business is involved. Cf. *Davis v. United States,* 328 U.S. 582, 592-3; *United States v. Robinowitz,* 339 U.S. 56, 64.

and undertook a search of both the truck and the house and found contraband whiskey. A conviction was reversed on the ground that the entry into the house, the arrest of the appellant found therein, and the search thereof were unlawful and "plainly violated Section 2236, 18 USCA".[41] (188 F. 2d at 120). The Court of Appeals pointed out that the case was not one of a rapidly moving automobile nor did it present any emergency situation requiring immediate action. It noted that the officers had received the information on which they acted at least six hours prior to the time of the arrests and search; that there was a United States Commissioner available, and that it was "clearly feasible" for them to apply for the necessary warrants.

Except for the fact that in the *Baxter* case the defendants were bootleggers, and that in this case the petitioners are claimed to have harbored Communists, the cases are indistinguishable. Applying the law of the *Baxter* case to the facts of this case, it is clear that there was no justification for the search of the house, the outhouse, or the automobiles merely by virtue of the arrest of Thompson and petitioner Steinberg outside the house.

There is no precedent whatsoever for the proposition, urged by the government, that a search of a private dwelling without warrant may be justified by arrests which occurred outside the dwelling.

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[41] 18 U.S.C.A. 2236 makes it illegal to search "any private dwelling used and occupied as such dwelling without a warrant". By its terms it does not apply to any person serving an arrest warrant or arresting or attempting to arrest a person committing or attempting to commit an offense in the presence of the officer or one who is suspected on reasonable grounds of having committed a felony.

The high purposes of the Fourth and Fifth Amendments counsel that this Court should not approve the extension, here sought by the government, of the limited power to search dwellings without warrant.

(2) The Time

A search incident to a valid arrest must occur *contemporaneously* with the arrest. *Agnello v. United States,* 269 U.S. 20; *United States v. Lee,* 83 F. 2d 195, 196 (2 Cir.); *Papini v. United States,* 84 F. 2d 160, 163 (9 Cir.); *Steeber v. United States,* 198 F.2d 615 (10 Cir.). Undoubtedly the requirement of contemporaneity has been imposed in order to assure that the victims of the search be present at the time of the search and that the officers not proceed "surreptitiously" or by stealth. *United States v. Jeffers,* 342 U.S. 48, 52.

While the entire process of ransacking the house following the arrest and removal of petitioners was illegal, the search most obviously outlawed by the lapse of time was the search of the outhouse which was conducted five days after the arrests and while petitioners were in custody in San Francisco. This "beer can search" was commenced by a trespass and an illegal entry,[42] and was tainted with illegality throughout. The evidence so obtained clearly should have been suppressed. No excuse whatsoever for this search without warrant can be possibly shown. The fact that such a search occurred at all highlights the unwillingness of the agents involved to

[42]No permission was sought or obtained from petitioner Kremen who was the lawful lessee of the premises when this search took place (R. 138).

recognize the procedural requirements of the Fourth and Fifth Amendments.

(3) The Purpose

As in the case of an arrest without warrant, the right to search without warrant must be determined by the situation which is disclosed to the arresting officers before the search is made. *Weeks v. United States,* 232 U.S. 383; *Byars v. United States,* 273 U.S. 28, 29. It is on the basis of the facts known to the officers at, or prior to, the time of the search that the purpose of the search is revealed. That purpose, as so revealed, must be a lawful one. If, at the threshold of the search, the purpose of the officers appears not to be reasonable or lawful, then the search, despite the existence of a valid arrest is illegal.

Thus a search may not be conducted for the purpose of making possible future arrests (*Taylor v. United States,* 286 U.S. 1, 6; *Papini v. United States,* 84 F.2d 160, 163 [9 Cir.]), or, under the guise of being incidental to an arrest, for the purpose of procuring evidence against the defendant. (*Henderson v. United States,* 12 F.2d 528 [4 Cir.]); *McKnight v. United States,* 183 F.2d 977 [D.C. Cir.]). Such an illegal purpose condemns the search from the beginning irrespective of what it turns up. *Bushouse v. United States,* 67 F.2d 843 (6 Cir.); *Takahashi v. United States,* 143 F.2d 118 (9 Cir.).

Here the purpose plainly was to seize evidentiary materials which might be used against petitioners to convict them of crimes with which they had not yet been

charged. This Court has invalidated such rummaging, general searches for evidentiary materials. *Go-Bart Importing Co. v. United States,* 282 U.S. 344; *United States v. Lefkowitz,* 285 U.S. 452. In *Lefkowitz* this Court said:

> "Here the searches were exploratory and general and made solely to find evidence of respondent's guilt of the alleged conspiracy or some other crime. Although intended to be used to solicit orders for liquor in violation of the Act, the papers and other articles found and taken were in themselves unoffending. The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the government, to discover property concealed in order to avoid payment of duties for which it is liable, and from searches such as those made for the seizure of counterfeit coins, burglar's tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime." (285 U.S. at 454.)

Even where the officers have a valid warrant or make a valid arrest, such a rummaging search is condemned.

> "After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed the warrant would give more protection for presumably it must be issued by a magistrate. . . . Nor should we forget that what seems fair enough against a squalid huckster of

> bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition." (*United States v. Kirschenblatt,* 16 F.2d 202, 203 [2 Cir.].)

How prescient Learned Hand was thirty years ago!

The government's reliance (Br. in Opp. 11-12) upon *United States v. Rabinowitz,* 339 U.S. 56, *Agnello v. United States,* 269 U.S. 20, *Marron v. United States,* 275 U.S. 192, and *United States v. Lindenfeld,* 142 F.2d 829 (4 Cir.) cert. den. 323 U.S. 761, is misplaced.

Rabinowitz is an instance of a *narrow* search, within an *office* upon the basis of an *arrest made therein* under a *valid warrant;* the *purpose* of the search was *specific:* for items which *in themselves were criminal to possess.* The Court specified in detail the bases upon which it held the search valid:

> "We think the District Court's conclusion that here the search and seizure were reasonable should be sustained because: (1) the search and seizure were incident to a valid arrest; (2) the place of the search was a business room to which the public, including the officers, was invited; (3) the room was small and under the immediate and complete control of respondent; (4) the search did not extend beyond the room used for unlawful purposes; (5) the possession of the forged and altered stamps was a crime, just as it is a crime to possess burglars' tools, lottery tickets or counterfeit money."
> (*United States v. Rabinowitz,* 339 U.S. at 64.)

None of these factors was present in this case.

Even in the face of the strong facts of the *Rabinowitz* case, the majority there was careful to point out that the

> "... law officers must justify their conduct before courts which have always been, and must be, jealous of the individual's right to privacy within the broad sweep of the Fourth Amendment." (339 U.S. at 66.)

Agnello v. United States, 269 U.S. 20, appears to be of no help whatsoever to the government, for there a conviction was *reversed* because an arrest at one place was followed up by a subsequent search at another. There, as here, the defendants had been arrested and were "in custody elsewhere" (269 U.S. at 31) at the time of the search. Such a search, said the Court, "cannot be sustained as an incident of the arrest" (*ibid.*).

Marron v. United States, 275 U.S. 192, and *United States v. Lindenfeld,* 142 F.2d 829 (2 Cir.) like *Rabinowitz* present situations totally different from that at bar. In *Marron* the officers had gained access to the premises by virtue of a search warrant (275 U.S. at 193) and, after entry, had actually observed the law being violated, i.e., intoxicating liquors being sold to patrons (275 U.S. at 194). Thus there could have been no question in that case, as there is here, of the validity of either the search or the arrest. In addition, in *Marron* the officers seized only "things used to carry out the criminal enterprise" (275 U.S. at 199). Here the officers did not so limit themselves: they searched all of the rooms and closets of the entire house; they read and examined papers and documents from boxes, suitcases, brief cases and desk drawers located in different

rooms throughout the house; they thoroughly searched two automobiles located in the parking area outside the house. Later, in the absence of petitioners,[43] they seized and removed "everything . . ." (R. 286). This mass of material was then loaded into the officers' automobiles and driven to San Francisco for study and analysis, and that which the government believed had evidential value was introduced against petitioners. About a week later, the officers returned and made a still further search for fingerprints. There was no showing that the material so seized was contraband, or criminal to possess, or was used to carry out the crimes with which petitioners were charged, or any crime. Nothing in *Marron* can conceivably justify searches and seizures of this sweeping character.

In *United States v. Lindenfeld,* 142 Fed. 2d 829 (2 Cir.), the search was an incident to an arrest which was lawful because the officers observed the actual commission of the crime (149 F.2d 831). The search itself was lawful because it was limited to prescription cards which the defendant doctor was required by law to keep and which he used for the unlawful purpose of concealing his crimes. The cards were therefore not merely evidence of the crime, but were actually part and parcel of the criminal enterprise itself. The Court pointed out that in terms of time and area, the search was reasonably limited and that there was not an "exhaustive and minute combing of the premises" such as was found in the *Go-Bart* and *Lefkowitz* cases. Nor, it

[43]In *Marron* it is clear that the search and seizures were made in the presence of the person arrested (275 U.S. at 194, 199).

observed, was there any "thorough ransacking of the house" (142 F.2d at 833) such as the record here reveals. The difference between the kind of material seized in the *Lindenfeld* case and that which was seized here, as well as the difference between the search there and the ransacking which occurred here, demonstrates why that case is far from controlling here, and why its holding should not be extended to cover the facts of this case.

b. There were no exceptional circumstances which justified the search without warrant.

The doctrine that "exceptional circumstances" may sometimes justify a search without warrant (cf. *Johnson v. United States,* 333 U.S. 10, 14), stemming from *Carroll v. United States,* 267 U.S. 132, affords no justification for the holding below.

In the *Carroll* case this Court had before it the question of whether a search and seizure without warrant, made pursuant to legislation specifically authorizing such action in cases involving contraband liquor being illegally transported by motor vehicle in violation of prohibition laws (Section 26, Title II, National Prohibition Act, 41 Stat. 315; 27 U.S.C.A. 40), was consistent with the requirements of the Fifth Amendment. As the lengthy opinion of Chief Justice Taft indicates, the Court was deeply conscious of the difficult problem posed by even this question and resolved it in favor of the government only insofar as the statute was applied to "contraband goods concealed and illegally transported in an automobile or other vehicle" (267 U.S. at

153). Justices McReynolds and Sutherland dissented, believing that

> "... the damnable character of the 'bootlegger's' business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods" (267 U.S. at 163).

The fact that the search in *Carroll* was authorized by an act of Congress has been regarded as a matter of prime significance in explaining that decision; it has been recognized that the Court was "reluctant" to hold that a search authorized by an act of Congress was unreasonable, thereby rendering the legislation itself unconstitutional. *United States v. Di Re,* 332 U.S. 581, 585. *Carroll* has not been read as meaning that absent such legislation, even the search there conducted would have been sustained. In the case at bar there is no such special legislative grant of authority which can be used to buttress the argument that the search here was reasonable.

Indeed, such legislation as governs the situation at bar, far from authorizing these searches and seizures, condemns them. 18 U.S.C.A. 3107 provides that agents of the Federal Bureau of Investigation are "empowered" to make seizures "under warrant" for violations of law. We know of no legislation which empowers those agents to engage in such a search and seizure without warrant. And F. R. Crim. Pro., Rule 41, spells out in detail what is required before a search warrant may be obtained. Clearly, the agents here bypassed the requirements of the statute and the rule for fear that compliance would have made impossible the

wholesale ransacking and seizure in which they obviously intended to engage once the arrests were effected. They were determined to obtain evidence which they thought would assure convictions and they did not propose to let statutes or rules (or the Constitution itself) stop them.

But apart from the question of legislative authorization, the *Carroll* search involved only the transportation of contraband on public highways in swiftly moving vehicles.[44] Those were the "exceptional circumstances" without which, even in the face of the legislation, the Court would, as its opinion indicates, undoubtedly have had serious questions about the legality of the search. See *Brinegar v. United States,* 338 U.S. 160, 176. No such facts exist here, and there is no reason why the *Carroll* ruling should be extended to cover this totally dissimilar situation.

Later cases have pointed up the nature of the "exceptional circumstances" which might conceivably justify a dilution of the precious guarantees of the Fourth and Fifth Amendments. They have intimated that possibly the search of a moving vehicle as distinguished from permanent premises may excuse a search without warrant; or that if officers have reason to apprehend violence or to believe that evidence may be removed, concealed or destroyed, or that suspects are likely to flee, they may proceed without warrant. *Johnson v. United*

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[44]Indeed, in *Carroll* and related cases the car itself was the "indispensable instrumentality" of the crime, and to that extent was itself the "offender and became contraband" (*United States v. Di Re,* 332 U.S. 581, 586).

States, 333 U.S. 10, 15; *Jeffers v. United States*, 342 U.S. 48, 52. The evidence here establishes that there was no show of violence by petitioners, no resistance to the arrest, no attempted flight, and no effort to remove, conceal or destroy property (R. 107, 277). Thus there is no occasion for the government to seek to bring this case within the scope of these observations.

While the fact that a suspect was "fleeing or able to take flight" may possibly justify the arrest or search of that person (*Johnson v. United States*, 333 U.S. 10, 15), it has never been suggested that that circumstance would condone the indiscriminate arrest and search of all who were at the scene with him, or the indiscriminate subsequent search of the premises, parked automobiles, and outhouses—all without warrant. Certainly no such "emergency" can justify the search of the outhouse here, five days after the arrest. The "flight" exception, even if the government should urge it because two of the persons arrested were fugitives, cannot be extended to condone everything that was done here.

It is questionable, in any case, whether that exception does apply here. The "flight" contemplated must obviously be a flight which the officers reasonably apprehend at the time of the arrest. Otherwise, all suspected fugitives, and presumably all others charged jointly with them, will as a class be excluded from the protection of the Constitution. A situation of flight or projected flight prior to the arrests and searches is not presented on this record. Here, all those arrested apparently were well established at the cabin and, for aught that appeared to the officers, they were settling

in for a long summer stay. There is no evidence that prior to or contemporaneously with the arrest there were any indications of flight on the part of anyone (R. 277).

In any case, the officers could easily have prevented any flight (or the removal or destruction of property properly subject to seizure) by obtaining warrants in advance or by guarding the premises until one of their number had obtained warrants. *United States v. Jeffers*, 342 U.S. 48, 52; *United States v. Coplon*, 185 F.2d 629, 636-637 (2 Cir.). The record shows that there were more than enough officers involved to do either.

No reason can be given to justify the failure to obtain warrants save inconvenience to the officers and the slight delay that would be occasioned in order to prepare the necessary papers and present the evidence to a magistrate.[45] But it has been consistently held that this circumstance will not excuse "by-passing the constitutional requirement." *McDonald v. United States*, 335 U.S. 451, 455; *Johnson v. United States*, 333 U.S. 10, 15. The officers had, and took, ample time to make the extended preparations necessary for those arrests (see pp. 18-19, *supra*). There is therefore no occasion under the guise of a claimed emergency for depriving petitioners of the rights guaranteed to them under the Fourth and Fifth Amendments.

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[45]Pursuant to the provisions of 28 U.S.C.A. 631, there have been appointed in the Northern District of California, commissioners who are located at the following places: Alturas, Arcata (Eureka), Mineral (Lassen National Park), Modesto, Oakland, Redding, Sacramento, Salinas, San Francisco, San Jose, Stockton, Susanville, and Yosemite National Park. The places nearest to Twain Harte are at Stockton (*supra*, n. 16) and Modesto, about 60 miles away.

This Court has recognized time and again that

> ". . . the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests" (*United States v. Lefkowitz*, 285 U.S. 452, 464).

Contrary to the reiterated complaints of most law enforcement officers, such a procedure does not impede efficient law enforcement. It simply requires the enforcing agency to submit its evidence to judicial scrutiny before acting on it. It merely prevents the law enforcement officer from being the judge in his own cause.[46]

Because of the failure of the officers to comply with the procedural requirements of the Fourth Amendment and because of the introduction into evidence, contrary to the guarantees of the Fifth, of the evidence thus illegally obtained, the convictions against petitioners cannot stand and the judgments below must be reversed.

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[46] "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent" (*Johnson v. United States*, 333 U.S. 10, 14).

II.

SECTIONS 3, 371 AND 1071 OF TITLE 18 OF THE UNITED STATES CODE WERE UNCONSTITUTIONALLY APPLIED TO PETITIONERS IN THAT (A) PETITIONERS WERE PLACED IN DOUBLE JEOPARDY BY AN UNCONSTITUTIONAL PYRAMIDING OF OFFENSES; (B) SECTION 3 WAS CONSTRUED IN A MANNER CONTRARY TO THE COMMON LAW AND TO THE REQUIREMENTS OF THE FIFTH AND SIXTH AMENDMENTS; AND (C) THE SECTIONS WERE APPLIED TO PETITIONERS IN THE ABSENCE OF ANY EVIDENCE OF SCIENTER.

(A) PETITIONERS WERE PLACED IN DOUBLE JEOPARDY BY AN UNCONSTITUTIONAL PYRAMIDING OF OFFENSES.

At the time of the raid petitioners Kremen and Coleman were told that they were being arrested for "harboring" the fugitives (R. 101, 201), and petitioner Steinberg that he was being arrested on the basis of a warrant issued out of the Southern District of New York (R. 98, 201).[47]

The harboring offense is a violation of 18 U. S. C. A. 1071 and at the time of the arrests carried with it a maximum penalty of six months imprisonment and $1000 fine.[48] However, by the subsequent addition of a charge

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[47]That warrant (Exh. 120; R. 893, 900-901) charges a violation of the Smith Act. Steinberg has since been tried for that offense (*United States v. Trachtenberg et al.*, S.D. N.Y. No. C-136-7), and his conviction is presently pending on appeal to the Court of Appeals for the Second Circuit.

[48]On August 20, 1954, the statute was amended to increase the penalty to one year's imprisonment and $1000 fine, except if the warrant or process were issued on a felony charge, in which case the maximum punishment was fixed at five years imprisonment and $5000 fine (68 Stat. 747).

The legislative reports on the amendment (Sen. Rep. No. 2141, 83rd Cong., 2d Sess.; H. R. Rep. No. 1928, 83rd Cong., 2d Sess.) demonstrate an awareness that the only statute properly applicable to this very case was 18 U.S.C.A. 1071. This case was specifically cited and the reason urged for the amendment was that the then existing penalties were inadequate to deter persons from "concealing Communist

of accessoryship to Thompson's offense (18 U. S. C. A. 3) and of two charges of conspiracy,[49] the Government was able to obtain the return of an indictment which carried with it potential penalties of 8½ years imprisonment and $17,000 in fines for petitioners Kremen and Coleman, and slightly less than that for petitioner Steinberg. The sentences actually imposed, while not reaching these maxima, were all in excess of that which was permitted under 18 U. S C. A. 1071.

Petitioners contend that what was at most a single act of harboring was thereby permitted to become the basis for four separate and distinct offenses upon which they received consecutive sentences in contravention of their rights under the Fifth Amendment to the Constitution.[50]

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fugitives". Neither the reports nor the letter from the Attorney General attached thereto and dealing with this situation intimated that any other statute (certainly not the accessoryship statute or the conspiracy statute. [see *infra*, pp. 60-65]) was applicable.

[49] "... that darling of the modern prosecutor's nursery" (*Harrison v. United States*, 7 F. 2d 259, 263 [2 Cir.]).

Time and again our leading judges have inveighed against the use of the conspiracy concept to "sweep within the dragnet" those associated in any degree with the main offenders. *United States v. Falcone*, 109 F.2d 579, 581 (2 Cir., per Learned Hand, J.) See also Mr. Justice Jackson in *Krulewitch v. United States*, 336 U.S. 440, 445-446.

[50] While petitioner Kremen's sentences were all concurrent, she received under the first two counts (the accessoryship count and the count charging the conspiracy to commit that offense) sentences in excess of what could have been imposed upon her under the harboring counts alone. Thus, as to her, if the argument below as to the invalidity of the accessoryship count and its conspiracy counterpart is sustained, the sentences imposed on those counts must be set aside.

1. The conviction of petitioners Kremen and Coleman on both the accessoryship and harboring counts is invalid or, in the alternative, the conviction of petitioners Kremen and Steinberg on the accessoryship counts must be reversed for lack of evidence to support it.

While this Court has permitted a single act or a series of acts to supply the basis for convictions for separate offenses, it has done so only "so long as each requires the proof of a fact not essential to the other." *Perreira v. United States,* 341 U. S. 1, 9. Here, however, by the very facts of the case, all of the proof which established the harboring of Steinberg also established the accessoryship after the fact to the Thompson conviction. Neither offense required the proof of any fact not essential to the other.

Certainly as to petitioner Kremen this is true. There is no evidence against her save and except that which deals with the rental of the house, the procurement of supplies, and the occupancy of the premises and its use by both Steinberg and Thompson. As to her, there was no additional fact which was proved or required to be proved with relation to Thompson in addition to that which was proved and required to be proved with relation to Steinberg. Every fact that was required to make out the charge of accessoryship was equally required to make out the charge of harboring.

As to petitioner Coleman, while the additional facts of his travels with Thompson in Missouri and Montana were adduced at the trial, they were not *required* to make out the accessoryship offense. That offense was complete, according to the government's theory, without any such evidence because the Government obtained

convictions against Kremen and Steinberg (and also Ross[51]) without any such additional evidence as it had offered against Coleman. Thus such additional evidence must have been unnecessary to establish the accessoryship offense, and it must be, on the government's theory, that the mere presence in the cabin was enough to make out the accessoryship.

If the government disclaims this theory, then it follows logically that the accessoryship convictions of Kremen and Steinberg cannot stand. For then those petitioners have been convicted without proof of an essential element of the offense. In other words, if something more than mere presence is required, then the government's case against Steinberg and Kremen on the accessoryship count and its conspiracy counterpart must fall. On the other hand, if mere presence is enough to make out the accessoryship offense, then no fact "not essential" to the harboring offense is present with respect to the accessoryship offense.

Thus petitioners Kremen and Coleman were placed in double jeopardy by their trial and conviction upon both the harboring and accessoryship offenses, and as to them, the judgments of conviction on Counts 1 and 2 must be set aside. Or, alternatively, petitioners Kremen and Steinberg were improperly convicted on the accessoryship counts since there was no proof of the additional element, whatever it may be, "essential" to that offense.

The multiple convictions of Kremen and Coleman on the harboring and accessoryship charges are contrary

[51]See *supra*, n. 7.

to the rule that federal criminal statutes are not to be construed as creating multiple offenses merely because they prohibited criminal act as multiple objects. Cf. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218; *Bell v. United States*, 349 U. S. 81; *Short v. United States*, 91 F. 2d 614, 620-624 (4 Cir.). Or, the convictions of Kremen and Steinberg on the accessoryship count, without proof of an "essential" element thereof, is a deprivation of their liberty without due process of law.

2. The conviction of petitioners Kremen and Coleman for participating in two conspiracies is invalid.

In addition to splitting up into two substantive offenses what was at most the single crime of harboring, the government also split what was at most a single conspiracy into two separate conspiracies. If there was any conspiracy shown by this record, it was a conspiracy to aid persons who were fugitives from Smith Act prosecutions. There was no evidence whatsoever to show any agreement to aid Steinberg separate and apart from an agreement to aid Thompson, or *vice versa*. The evidence which was relied upon to establish the existence of an agreement—and it was all circumstantial evidence, the agreement being inferred from the acts of the various petitioners—applied equally to both conspiracy counts and, as will be seen,[52] was admitted as bearing upon both without any distinction. The overt acts alleged to support each conspiracy are essentially the same (R. 4, 8), and consist, as has been seen, pri-

[52] *Infra*, p. 64.

marily of the joint occupancy of the cabin at the same time and place by petitioners and the fugitives.

In such a situation a single agreement may not be split up into multiple offenses merely because "it envisages the violation of several statutes rather than one." *Braverman v. United States,* 317 U. S. 49, 53; see, also, *Frohwerk v. United States,* 249 U. S. 204; *United States v. Rabinowitz,* 238 U. S. 78; *United States v. Cohen,* 197 F. 2d 26, 29 (3 Cir.); cf. *United States v. Adams,* 281 U. S. 202, 204.

3. The conviction of all petitioners on the conspiracy counts, in addition to their convictions on the substantive counts is invalid.

While Steinberg may not reap the benefit of the argument thus far made unless the Government disavows the theory upon which it procured the convictions of Kremen and Coleman on the accessoryship count,[53] it is clear that he as well as the other petitioners was subjected to double jeopardy by convictions on both the substantive and conspiracy counts. For the record shows that not only were the same acts required to be shown in connection with the two substantive offenses, but that these very same acts also laid the basis for the conviction on the conspiracy counts.

While it is true that one person alone may commit the crimes of accessoryship or harboring, and while it is true that a conspiracy normally involves the added element of an "agreement" among several persons, the fact of the matter is, and the record here reveals it to

[53] *Supra,* pp. 60-61.

be so, that when a multiplicity of defendants are involved in a harboring or accessoryship situation, they of necessity must act in concert. They cannot commit the substantive crime in any other way. In other words, if two or more persons, at the same time and place, harbor a fugitive or are accessories after the fact to a crime, they must act in concert. It is inconceivable that more than one person can commit these substantive offenses without there being at least an "implied" agreement.

Indeed, this must have been the unexpressed theory of the Government at the trial, since it is the only possible justification for its motion that "all the testimony and exhibits heretofore admitted as to certain defendants be admitted to all defendants" (R. 74; 901). This could have been the only theory on which the trial court granted that motion (R. 75). This blanket offer of evidence by the Government and its receipt by the trial court was not upon the usual theory that co-conspirators may bind each other, for the jury was never instructed that the evidence so received was to be limited to the conspiracy counts alone. And indeed, the conspirators were not alleged to have been identical in the two counts. Steinberg was named as a conspirator in the second but not in the fourth count, while Thompson was named as a conspirator in the fourth count but not in the second count (R. 4-6).

Since all of the evidence was admitted against all defendants on all counts, it is clear that no distinction was ever made by the Government in its handling of the evidence, by the trial court in its receipt of it, or by the

jury in its understanding of it, as between the substantive and the conspiracy counts. Thus, whatever may be the rule in other situations, the facts here as well as the legal theory upon which the case was tried, demonstrate that the substantive offenses were merged in the conspiracy. It has been held that in such a case, a conspiracy charge may not be added to the substantive offense. *United States v. Katz,* 271 U. S. 354, 355-356; *Gebardi v. United States,* 287 U. S. 112, 121-122; *Pinkerton v. United States,* 328 U. S. 640, 643.

The Government, the trial court, and the affirming judges permitted petitioners to be convicted and sentenced on a series of separate and disparate counts, although all of the evidence against all of them at best established but a single violation of the harboring statute. The judgments against them, particularly in view of the fact that consecutive sentences were imposed upon petitioners Coleman and Steinberg, and that the sentences imposed upon all petitioners (including Kremen) were in excess of that permitted under the harboring statute, cannot stand. *Dimenza v. Johnson,* 130 F. 2d 465 (9 Cir.); *Robinson v. United States,* 143 F. 2d 276 (10 Cir.); *Smith v. United States,* 211 F. 2d 957 (6 Cir.); *O'Neill v. United States,* 236 F. 2d 636 (6 Cir.).

(B) SECTION 3 WAS CONSTRUED AND APPLIED IN A MANNER CONTRARY TO THE COMMON LAW AND TO THE REQUIREMENTS OF THE FIFTH AND SIXTH AMENDMENTS.

In addition to the foregoing reasons why the accessory statute (18 U.S.C.A. 3) cannot be applied to these petitioners, whose sole offense, if one existed at all, was harboring, is the further reason that the accessory after the fact statute was never intended to apply to assistance rendered a fugitive three years after his conviction and thousands of miles away from the place where he had long since completed the commission of the principal offense.

The definition of an accessory after the fact contained in Section 3[54] "is based upon the authority of" *Skelly v. United States,* 76 F. 2d 483 (10 Cir.), cert. den. 295 U. S. 757 (Reviser's Note, 18 U.S.C.A. 3). The *Skelly* opinion in turn is based squarely upon the common law definition found in Blackstone and the early American state cases (76 F. 2d at 487).[55]

At common law an accessory to a crime was a *party* thereto, one who was connected directly therewith or "in some way concerned therein". Indeed, at common law the acts of the principal and the accessory constituted "one continuous transaction . . ., a single offense committed by them jointly . . ." for which the parties could be jointly tried in a single indictment. *Skelly v.*

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[54] "Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment . . ."

[55] Even prior to the enactment of the statutory definition, the federal courts looked to the common law for the meaning of this term. *United States v. Chapman,* 3 F.Supp. 903 (S.D. Ala.).

United States, supra, at 487-488. Cf. also, *Nye & Nissen v. United States,* 336 U. S. 619; *United States v. Peoni,* 100 F. 2d 401 (2 Cir.); *United States v. Paglia,* 190 F. 2d 445 (2 Cir.). Absent this close relationship to the principal crime, there was no accessoryship at common law; an aider and abetter was not, as the accessory was, a *party* to the crime.[56]

It follows from the foregoing that, when, as here, the principal crime has been completed by the apprehension and conviction of the principal offender, there is neither a legal nor a logical possibility of anyone's then becoming an accessory after the fact to that crime. The principal crime having come to an end and no longer having a current existence, so to speak, one cannot become an accessory, that is, a party, to it. One may commit other offenses, but not the offense of accessoryship. One might conceivably become an accessory to a *new* crime which has as yet been undetected or concerning which the principal offender has as yet not been indicted, tried or convicted, but certainly once there has been a specific conviction, aid rendered thereafter cannot constitute accessoryship.

The indictment here alleged that Thompson had been "convicted" of an offense before petitioners rendered any assistance to him, and the proof (Exh. 121; R. 901) showed that the conviction had occurred three years before the aid was rendered. Thus the principal offense so far as Counts 1 and 2 are concerned was long since

[56]However, this does not mean that the aider and abetter was not ject to punishment (see *infra,* p. 68), but it was not as an accessory.

at an end. There was in 1953 no "continuous [criminal] transaction" with which petitioners could have been involved as accessories after the fact. If the indictment had alleged that Thompson had committed additional violations of the Smith Act, perhaps petitioners could have been charged with being accessories after the fact to those violations. And perhaps petitioners Kremen and Coleman could have been charged with being accessories after the fact to Steinberg's continuing violation of the Smith act, if such had been alleged.

None of the petitioners were so charged, however. The only accessory after the fact charge in this case had to do with Thompson's already completed offense. As to it, the record is clear that long before petitioners rendered any aid to Thompson, he had suffered a conviction therefor. At common law, aid rendered in such instances[57] does not constitute accessoryship.

There were, of course, other crimes which could be committed at common law by one aiding the principal offender. These crimes, while superficially resembling accessoryship, were analytically quite different. They involved giving aid (generally post-conviction) to the principal offender without, however, participating in the principal crime. Such offenses included misprision of felony, compounding felony, escape, prison breach, aid to fugitives, etc. 2 Hawkins P. C. § 29; 9 Halsbury's Laws of England (2d ed.) §§ 593-599. They did not, however, include accessoryship after the fact.

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[57]With the possible exception of jail break assistance. See *infra*, p. 69. Such assistance is not involved here.

The affirming opinion, asserting that petitioners are in "palpable error" on this point, quotes a portion of Bishop's Criminal Law (231 F.2d at 167; R. 964; App. 34), not recognizing, however, that the author at that place is specifically discussing only "rescue . . . from the lawful confinement . . ." (Bishop, Criminal Law [9 ed.], 500-501), and that, except for such jail break, not a single case of accessoryship has been reported at common law based upon acts of assistance rendered after the conviction of the principal.[58]

Nor does the presence of the word "punishment" in Section 3 alter the case. In the first place, the word itself is ambiguous: one may seek to elude punishment in advance of, as well as after, conviction. Since it is subject to at least these two constructions, the word, appearing as it does in a criminal statute, must receive the narrower interpretation here contended for by petitioners, and may not be enlarged to embrace what Congress might have said, but did not clearly say. *Pierce v.*

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[58]The sentences in *Bishop* immediately following the language quoted by Judge Lemmon are:

> "If a man is committed on a charge of a felony, though only awaiting his trial, *the rescuing of him, or helping him to break prison*, is a distinct felony, equally whether he is guilty or not; when the commitment is on a charge of a misdemeanor, it is, irrespective of the question of guilt, a misdemeanor. Still where the commitment is for a felony, *the rescuer* is also, or may be, an accessory after the fact in it; and as the crime of the accessory is itself a felony, it is immaterial with which form of felony he is charged." (Bishop, *Criminal Law*, 9th Ed., Sec. 697, pp. 500-501; italics added.)

The two cases cited in *Bishop* at this point, *Rex v. Burridge*, 3 P.Wms. 439, and *Commonwealth v. Miller*, 2 Ashm. 61, each involved aiding a prisoner to escape from custody. *Rex v. Greenacre*, 8 Car. & P. 35, cited by the government in its Brief in Opposition (p. 14) was a *nisi prius* charge given to a jury in 1837, long after the reception of the common law here.

United States, 314 U. S. 306; *United States v. Weitzel,* 246 U. S. 533; cf. *Lanzetta v. New Jersey,* 306 U. S. 451.

Secondly, the commonly accepted definition of the term at common law already included the word "punishment":

> "An accessory after the fact is one who knowing a felony to have been committed, harbors the felon or renders him any other assistance to elude punishment." (Bishop, *Criminal Law,* 9th Ed., Sec. 692.)

Since common law words must be read in a federal statute as they were at common law (*Williams v. United States,* 179 F. 2d 644 [5 Cir.]), and since as we have seen the crime of accessoryship at common law did not include post-conviction aid, despite the presence of the word "punishment" in the definition, such aid cannot constitute accessoryship under the statute.

The affirming opinion advances an alternative ground for its holding. It says that whatever the common law rule may have been, "Congress had the undoubted power to enlarge the definition of accessoryship after the fact" (231 F. 2d at 167; R. 964; App. 35). This argument, however, is equally untenable to support the affirmance of the judgments of conviction on the accessoryship count and, therefore, its conspiracy counterpart. There is no question but that Congress had the power to enlarge the common law definition of the offense. The question presented, however, is whether Congress exercised that power. That Congress did not enlarge the common law definition of accessoryship is indicated by the fact that it used substantially the same

words as are found in the common law definition.[59] This is buttressed by the further fact that the Revisers make specific reference to *Skelly v. United States,* 76 F. 2d 483 (10 Cir.), which is based exclusively upon the common law, as the "authority" for the statutory definition. The "authoritative"[60] Revisers' notes demonstrate that Congress did not intend to enlarge the common law definition.

On the contrary, the legislative history of the 1948 codification of the criminal code shows that no enlargement of the common law definition was intended. That history clearly shows that Congress intended only to codify, and not to modify or enlarge, the then existing criminal law of the United States. Hearings before House Committee on the Judiciary on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess.; H. R. Rep. 304, 80th Cong., 1st Sess.; Sen. Rep. 1620, 80th Cong., 2d Sess.; 93 Cong. R. 5181-82; 94 Cong. R. 7928, 8906. Certainly an intention to enlarge the common law definition of accessoryship would have excited some comment during the course of the "impressive legislative history" of the codification. Cf. *Ex parte Collett,* 337 U. S. 55, 65-72.

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[59]The only jurisdiction we know of which specifically includes post-conviction aid in the definition of accessoryship after the fact is Texas where this result is obtained by virtue of a statute (Texas Penal Code, Art. 86) specifically defining an accessory after the fact as one who aids another in order, *inter alia*, to evade "*execution of his sentence*". See *Dent v. State,* 43 Tex. Cr. 123, 65 S.W. 2d 627, where at 65 S.W. 2d 636, it is made clear that this statutory language constitutes a *modification* of the common law concept that the "accessory was connected with the principal offender *before the* principal's conviction" and that this priority in time "*was necessarily* so . . ." in order to make out the offense at common law.

[60]*United States v. National City Lines,* 337 U.S. 78, 81.

The suggestion that petitioners' argument will result in a "strange frustration of the clear statutory purpose to deter aid and comfort to known offenders" (Br. in Opp. 13) is not tenable, since an analysis of the statutory scheme shows that Congress has itself carefully distinguished between aid rendered before and aid rendered after conviction, and has treated the two types differently in important respects.

Thus, while the offense of accessoryship is found in Chapter 1 of Title 18 (General Provisions), offenses dealing with post-conviction aid are treated in other portions of the Code. For example, in Chapter 35 (Sections 751, *et seq.*), Congress has made specific provision for punishing crimes of "escape and rescue", and in Chapter 49 (Sections 1071, *et seq.*), specific provision is made for dealing with "fugitives from justice". While this organization of the Code may not be controlling, it must not be overlooked in seeking to ascertain how Congress thought it was classifying the crimes with which it dealt. Clearly its separate treatment of crimes dealing with post-conviction aid indicates that its purposes will not be "frustrated" if this Court deals likewise with such crimes and limits them, by excluding from their scope (as Congress did), accessoryship after the fact.

Nor is there any danger that those who render "aid and comfort" to known offenders will go unpunished. It is manifest from an examination of 18 U.S.C.A. 751, *et seq.*, and 18 U.S.C.A. 1071, *et seq.*, that Congress made adequate provision for the punishment of those who render after-conviction aid to the principal offender (including those who aid him in avoiding "punish-

ment"), and that the Criminal Code does not leave the nation powerless in the face of such crimes. There is therefore no necessity to expand beyond its traditional boundaries, the common law offense of accessoryship so as to make it embrace post-conviction aid.

(C) THE STATUTES WERE IMPROPERLY APPLIED TO PETITIONERS IN THE ABSENCE OF ANY PROOF OF SCIENTER.

1. The harboring counts.

The government does not deny that in order to convict petitioners Kremen and Coleman of harboring Steinberg, it was necessary for the government to prove (1) specific "notice and knowledge" on the part of each of them that a federal warrant had been issued for Steinberg's arrest, and (2) that the acts of concealment were for the specific purpose of preventing that arrest (Cf. R. 849-850); and *Fulbright v. United States,* 91 F. 2d 210 (8 Cir.), makes it clear that these two elements are essential for a conviction of a violation of 18 U.S.C.A. 1071.

While the affirming opinion and the government's Brief in Opposition dwell at great length upon the evidence dealing with concealment and fictitious identity, neither of them anywhere points to any evidence which establishes either directly or inferentially that petitioners Kremen and Coleman had the specific knowledge required by the statute. There is in fact no such evidence and the government's proof, therefore, falls short of establishing, or even tending to establish, that these petitioners had the knowledge or intent requisite to a conviction for harboring fugitives.

As the Chief Judge pointed out in his dissent, there are many reasons why these petitioners may have hidden Steinberg[61] apart from any knowledge of the existence of a federal warrant or apart from any purpose to frustrate its execution (231 F. 2d 179-180; R. 986-987; App. 65-66).[62]

The government's suggestion (Br. in Opp. 14) that the "suspicious circumstances" under which petitioners were apprehended casts a burden upon petitioners to proffer an explanation of their activities, is an unwarranted attempt to shift the burden of proof from the government to petitioners, and if permitted to succeed will destroy any vestige of the presumption of innocence in this case. Certainly more is required to sustain a conviction than a showing of "suspicious circumstances"; certainly a defendant may not be convicted of a most serious felony because he chooses to rely upon the presumption of innocence and to remain silent when the government has produced nothing more tangible than "suspicious circumstances".

The reliance which the government placed upon the stolen property cases below is not well founded for, as the Chief Judge pointed out, a fugitive, unlike an in-

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[61] As a matter of fact, the evidence makes it rather more likely that Steinberg was concealing Coleman.

[62] The government, but not the affirming opinion, recognized that the burden of negativing possible alternative inferences rested on it. However, for the reasons specified in the dissenting opinion (231 F.2d 179; R. 987; App. 65), the government's attempt, below, to carry the burden (or shift it to petitioners) by the drawing of artificial analogies to cases involving stolen property, cannot be sustained. Nor can its efforts here (Br. in Opp. 15) to analogize the case to the "net worth" tax cases, meet with any more success.

animate and inarticulate piece of property, "could transport himself from place to place and could give [petitioners] any number of reasons why [they] should hide him" (231 F. 2d at 180; R. 987; App. 65-66). The basis for an inference which may be drawn from the unexplained possession of stolen property, does not exist in such a case as this. To apply any such irrational inference to the facts of this case would be to deny petitioners due process of law. *Tot v. United States,* 319 U. S. 463; cf. *Maggio v. Zeitz,* 333 U. S. 56, 66, 81.

Nor does the government's present reliance (Br. in Opp. 15) upon such tax cases as *Holland v. United States,* 348 U. S. 121, solve its problem. There, this Court held that once the government "has established its case", the defendant remains silent at his peril. The Court, however, was very careful to point out in great detail that the government had indeed established its case first, by "overwhelming . . . proof" of the amount of assets possessed at the commencement of the period in question (348 U. S at 135); second, by "proof of a likely source" from which the jury could have found the increases to have come (348 U. S. at 138); and third, by "evidence of a consistent pattern of underreporting large amounts of income" (348 U. S. at 139). Only because it had thus established its case, was the government entitled to a conviction. The Court was explicitly clear that, by its holding, it was not shifting the burden of proof to the defendant; on the contrary, it insisted that "the Government must still prove every element of the offense beyond a reasonable doubt . . ." (348 U. S. at 138).

The point in the case at bar is that, absent proof of *scienter*, the government had not established every element of its case and that the defendant therefore was not required to speak. And the suggestion that the "suspicious circumstances" were alone enough to establish a criminal case has not yet, so far as we know, ever been accepted by this Court.

2. The accessoryship counts.

With respect to the accessoryship counts, the situation is much the same.[63] Clearly, specific knowledge of the principal's offense and a specific intent to aid him, are essential to a conviction under Section 3. That section applies only to persons who, "knowing" that an offense has been committed, engage in the proscribed conduct. Absent such knowledge, there is no offense. If "general malevolence" is not enough to make out the offense of harboring (*Fulbright v. United States*, 91 F. 2d 210, 212 [8 Cir.]) it can hardly be deemed to be sufficient to sustain a conviction of the more serious accessoryship offense described in Section 3. Cf. *Skelly v. United States*, 76 F. 2d 483, 485 (10 Cir.); *Neal v. United States*, 102 F. 2d 643, 646 (8 Cir.).

The abortive efforts of the government to prove that petitioner Kremen had, many years earlier as a college student, been a "radical" (R. 836-852) or that one of the petitioners had subscribed to a presumably leftwing newspaper (R. 819-835), was based upon its recogni-

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[63] Of course, if the arguments made under either Subpoints (A) or (B), *supra*, are sustained, the conviction under the accessoryship count and its conspiracy counterpart cannot stand in any event.

tion of the necessity for establishing specific knowledge on the part of petitioners.[64] As the dissenting opinion points out, the government totally failed to establish that petitioner Kremen had the knowledge required to make out a case against her under the accessoryship counts. See 231 F. 2d at 181; R. 990; App. pp. 69-70. Petitioner Kremen presents this as a separate point on her own account.[65]

As to petitioners Coleman and Steinberg, evidence of their past associations with Thompson in the Communist Party was held to justify an inference that they "knew" of his Smith Act conviction. But such past associations are no adequate substitute for the specific knowledge required by the statute. To permit them to be so used conflicts directly with this Court's holdings in *Schneiderman v. United States,* 320 U. S. 118; *Weiman v. Updegraf,* 344 U. S. 183; and *Slochower v. Board of Higher Education,* 350 U. S. 511, to the effect that "association" is not evidence of guilt, intent or *scienter.* What the statute requires is specific knowledge of a spe-

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[64]We do not concede that even if the proffered testimony had been admitted it would have established the requisite knowledge. The significant point is that the government conceded that it was "absolutely necessary" for it to establish such knowledge before it could make out a case (R. 849-850).

[65]She also presents as a separate point on her own account the government's failure of proof with respect to her on the harboring counts as well.

Indeed, each petitioner stands before this Court as to each count on which he or she was convicted as a separate individual. None of them may be convicted upon evidence adduced against the other. This Court has held that the identity of defendants is not lost even in a charge of conspiracy. *Stack v. Boyle,* 342 U.S. 1, 9.

cific conviction, and this may not be inferred merely from past associations in an entirely different context.

Here, too, the "suspicious circumstances" relied upon, the inferences which the government seeks to draw from them, and the inference it seeks to draw from the fact that many years earlier these petitioners had been "long time cohorts" of Thompson in the Communist Party in New York, do not, as the Government believes (Br. in Opp. 14-15) point to guilty knowledge on the part of petitioners as the "only rational explanation" for their conduct. Other explanations, including those suggested in the dissenting opinion, are quite possible; and that being so, the Government had the burden of negativing them, or of at least proving that its thesis was more "likely" than any other (Cf. *Holland v. United States,* 348 U. S. 121, 138). Its failure to do so resulted in the conviction of petitioners without proof of the element of knowledge conceded on the trial to be "absolutely necessary" to make out a case.

III.

THE CONVICTION OF PETITIONERS ON COUNTS 1 AND 2 OF THE INDICTMENT CANNOT BE SUSTAINED BECAUSE (A) THESE COUNTS DID NOT ALLEGE FACTS SUFFICIENT TO CONSTITUTE AN OFFENSE AGAINST THE UNITED STATES; (B) THERE WAS A FATAL VARIANCE BETWEEN THE PLEADING OF THOMPSON'S CONVICTION AND THE PROOF THEREOF; AND (C) THE CHARGE WITH RESPECT TO THOMPSON'S CONVICTION WAS ERRONEOUS.

(A) COUNTS 1 AND 2 DID NOT ALLEGE FACTS SUFFICIENT TO CONSTITUTE AN OFFENSE AGAINST THE UNITED STATES.

Count 1 of the indictment charged that Thompson had been convicted of "conspiracy to (1) organize a society for the overthrow and destruction of the Government . . ." (R. 3) in violation, it was alleged, of Sections 2, 3 and 5 of the Smith Act and that petitioners were accessories after the fact to that crime. Sections 2, 3 and 5 of the Smith Act relate, however, not to societies organized for the overthrow of government, but rather to societies which "teach, advocate and encourage" certain proscribed doctrines.[66] Count 2 alleges a conspiracy to commit the crime described in Count 1. The omission of the words "teach, advocate and encourage" makes the indictment fatally defective, or at least so confusing as to render it insufficient to support a conviction.

An indictment must inform the accused of the nature and cause of the accusation against him, it must set forth the offense with clarity and certainty, and it must allege every ingredient of the offense accurately and clearly. *United States v. Cruikshank,* 92 U. S. 542. An

[66]The quoted language has been retained in the 1948 codification. 18 U.S.C.A. 2385.

indictment which charges an accused with being an accessory after the fact to one crime (conspiracy to organize a society "for the overthrow and destruction of government") and then five lines later alleges accessoryship after the fact to a violation of a statute creating an entirely different crime (conspiracy to "teach, advocate and encourage" illegal doctrines) cannot be said to meet the constitutional test.

It cannot be determined from the indictment whether the charge laid was accessoryship after the fact to a conspiracy to organize a society for the overthrow of government, or accessoryship after the fact to a conspiracy to organize a society to teach that doctrine. Since an accessory is a party to the principal crime, the same precision in pleading is required in accessoryship cases as in cases involving the principal crime itself. Certainly an indictment against Thompson charging the crime of "organizing to overthrow" in violation of Sections 2, 3 and 5 of the Smith Act would be fatally defective for inconsistency and lack of clarity; so too such an indictment against his alleged accessories must be equally bad.

This indictment did not advise petitioners with which of these two quite disparate offenses they were being charged. Nor is it clear from the indictment to what extent petitioners may plead their convictions here as a bar to future prosecutions for either or both of these offenses. Indeed, when petitioner Steinberg pleaded his conviction here in bar of an indictment charging him with a conspiracy to teach and advocate forcible overthrow and to organize the Communist Party so to teach

and advocate, his plea was overruled, despite the fact that he obviously could not be both a principal and an accessory to the same offense. *United States v. Stein*, 140 F. Supp. 761, 767 (S. D. N. Y.).

The affirming opinion called the foregoing defect in the indictment only "an artificiality in pleading" which it would not permit to be "tortured" into reversible error (231 F. 2d at 173; R. 975; App. 50). The government calls the language employed in the indictment merely a "compressed paraphrase" of the language used by Chief Justice Vinson in describing the conclusions of the Court of Appeals in the *Dennis* case (Br. in Opp. 16-17). We submit, however, that the Fifth Amendment's requirements that criminal pleadings be certain and precise, may not be so easily avoided. For the indictment to measure up to constitutional standards, it was necessary that it be cast in something a little more precise than a compressed paraphrase and that it avoid an inartificiality in language which led to a self-contradictory result.

The failure of the indictment to describe adequately the crime of which Thompson had been convicted was directed to the attention of the government and the trial court at the outset by the petitioners' Motion to Dismiss.[67] The government had ample opportunity to

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[67] Among the grounds specified in the Motion to Dismiss were:

"1. The first count of the indictment does not state facts sufficient to constitute an offense against the United States in that, among other things:

(a) It fails to allege that Robert G. Thompson was convicted of an offense against the United States . . .

2. The first count of the indictment is so vague and indefinite and so lacking in essential facts as to fail to advise the defend-

correct its error below and may not now complain if petitioners insist upon the point.

(B) THERE WAS A FATAL VARIANCE BETWEEN THE PLEADING OF THOMPSON'S CONVICTION AND THE PROOF THEREOF.

It is clear that if the first count of the indictment pleaded any offense, it was accessoryship to the crime of conspiring to organize a society for the overthrow of government. This was the crime pleaded specifically and in so many words. The conclusionary reference to Sections 2, 3 and 5 of the Smith Act is not controlling. Cf. *United States v. Hutcheson,* 312 U. S. 219; *Hammer v. United States,* 271 U. S. 620; *Pettway v. United States,* 216 F. 2d 106 (6 Cir.); *Holland v. United States,* 209 F. 2d 516 (10 Cir.); *Rose v. United States,* 149 F. 2d 755 (9 Cir.).

Yet, contrary to this specific charge, the proof established, in conformity with the actual fact (*Dennis v. United States,* 341 U.S. 494), that Thompson had been convicted of conspiring to organize a society to "teach and advocate" the proscribed doctrine (Ex. 121; R. 901).

The government's contention that this variance between its pleading and its proof was only "moderate"

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ants and each of them of the nature and cause of the accusation against them and each of them in each and every of the particulars set forth above.

3. The first count of the indictment is materially at variance with the statute upon which it is purportedly based (Title 18 U.S.C. 3) in that the said count fails to allege that Robert G. Thompson had committed an offense against the United States." (R. 9-11).

These objections to the first count of the indictment were incorporated by reference in that portion of the Motion to Dismiss directed to the second count. (R. 11).

(R. 894) cannot be sustained. On the contrary, the difference between a conspiracy to organize a society to overthrow government, and a conspiracy to organize a society to teach that doctrine, is a substantial one. Every Smith Act case has emphasized the distinction between the two; the First Amendment does not permit of any confusion on the point. But one does not have to go to the Constitution to note the differences between the two; the two offenses are clearly separate and distinct and are so specified in the separate and distinct statutes creating them. Thus 18 U.S.C.A. 2384, deals with seditious conspiracies, while 18 U.S.C.A. 2385 deals with unlawful advocacy. They are clearly not the same crime.

The variance which was called to the trial court's attention at the time the record of conviction was offered in evidence (R. 894), requires a reversal of the convictions of all petitioners on the first two counts of the indictment for the reason that, by virtue of it, the evidence fails to sustain the charge made. The affirmance of the convictions under such circumstances therefore constituted a denial of due process to petitioners. *DeJonge v. Oregon,* 299 U.S. 353; *Cole v. Arkansas,* 333 U.S. 196; Cf. *Neal v. United States,* 102 F.2d 643, 647 (8 Cir.) and *Guilbeau v. United States,* 287 F. 731 (5 Cir.).

(C) THE CHARGE WITH RESPECT TO THOMPSON'S CONVICTION WAS ERRONEOUS.

Despite this state of the record (an indictment charging that Thompson had been convicted of a conspiracy to organize a society for the overthrow of government

and proof establishing that he had been convicted of a conspiracy to organize a society to teach and advocate that doctrine), the trial judge charged the jury that "as a matter of law" Thompson had been convicted of "the said crime", or "the crime therein described".[68]

This charge, to which timely objection was made (R. 927-928), was doubly erroneous.

First, it never told the jury what "the crime therein described" was: whether it was conspiracy to organize for overthrow, as specifically alleged, or conspiracy to organize to teach and advocate, as alleged inferentially by the reference to Sections 2, 3 and 5 of the Smith Act. By referring only to the crime "therein described", the charge did not make it clear which of the two crimes charged in the indictment—the one specified in so many words or the one specified by reference to the sections of the Smith Act—was meant. Furthermore, it is impossible to tell from the charge whether the "said crime" refers to the crime or crimes charged in the indictment or to the crime proven by the record of conviction (Ex. 121; R. 896, 901). In either case, such an equivocal instruction requires a reversal of the judgment. *Bollenbach v. United States,* 326 U.S. 607.

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[68]The instruction in full reads as follows:

> "Now with reference to that first count of the indictment, let me say to you that you need not examine the facts or the record presented to determine whether or not Robert Thompson committed the crime *therein described*, because I now tell you and instruct you as a matter of law that the record shows that Thompson was convicted of *the said crime* in a United States court, and that judgment was pronounced against him and has become final. Consequently, Thompson did commit the crime of conspiring to teach the overthrow and destruction of the United States by force and violence." (R. 913-14, italics added.)

Second, the charge was plainly contrary to the record, which showed without contradiction that, while the indictment specifically charged the crime of conspiracy to overthrow, the proof established the conviction of the crime of conspiracy to teach. Thus the instruction that "the record shows" that Thompson was convicted of "the said crime" is incorrect. Indeed, the record affirmatively showed that Thompson was convicted of something quite different from the crime described in the indictment. It was therefore error not to permit the jury to examine the government's proof in order for it to determine whether the record of conviction did or did not prove the allegations of the indictment.

The government contends that since the petitioners could not contest the fact that Thompson had been convicted of violating the Smith Act (Br. in Opp. 17-18), there was no issue for the jury to decide. But this begs the question. The petitioners, by their motion to dismiss and by their pleas of not guilty, could and did contest the fact that Thompson had been convicted of the crime described in the indictment, a crime in connection with which they were charged as accessories after the fact. Furthermore, petitioners could and did and do contest the fact that the government proved what it alleged—that Thompson was convicted of conspiring to overthrow government and that they were his accessories in *that* endeavor. Clearly, therefore, there was an issue to go to the jury. Indeed, petitioners could well argue that as a matter of law the proof so clearly failed to establish the allegations of the indictment that they were entitled to a judgment of acquittal at the hands of

the trial court. But be that as it may, they were certainly entitled not to have a direction to the jury against them on this issue.

The affirming opinion seeks to meet this argument by saying only that the charge was given in "incomplete language", and by asserting that this fact may not be "magnified" into error (231 F.2d at 173; R. 975; App. 50). However, it is not the incompleteness of the language used by the trial judge which is the fatal defect on this phase of the case, but rather his categorical instruction that, so far as Thompson is concerned, the government had proved the crime which it charged in the indictment. The record was clearly to the contrary and it was error to give the instruction.[69]

CONCLUSION.

Apart from the defects in the indictment, the variance between it and the proof made, the inadequacy of the proof of petitioners' guilty knowledge, and the errors of the trial judge's charge, any one of which is enough to require a reversal of the convictions below, there are two major defects in the government's case.

First, it is clear that the prosecution took what was at best a single act of harboring and by charging in

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[69]Both the affirming opinion (231 F.2d 173; R. 975; App. 50) and the Brief in Opposition (p. 17) lay store by the fact that petitioners' counsel were well aware of the crime of which Thompson had been convicted. It is submitted, however, that knowledge of counsel is no substitute for the requirements (1) that the indictment clearly advise the defendant of the elements of the offense, (2) that the government proved what it charges, and (3) that the trial judge instruct the jury correctly.

addition to the harboring, the offense of accessoryship to a crime long since ended and adding on top of that two conspiracy counts as well, unconstitutionally extended the punishment which was meted out. Whether the "book was thrown" at petitioners because they were Communists or involved with Communists is beside the point. The point is that for the simple misdemeanor of harboring, which carried with it a maximum jail term of six months, petitioners have as a result of the Government's legal juggling, been ordered imprisoned for much greater periods of time.

Second, because they were regarded by the court below as Communist enemies of the United States, petitioners' convictions were affirmed, despite the fact that their arrests resulted from a lawless "raid" and an illegal trespass by agents of the federal government. Their convictions were affirmed below despite the fact that the evidence used against them at the trial was obtained as a result of lawless searches and seizures by these same agents. This conduct smacks of the police state and cannot be squared with the requirements of our Constitution.

This Court said just recently in another case where the "waters of justice" were found to have been "polluted" by the government's use, albeit unwittingly, of what even the dissent referred to as "tainted testimony":

> "The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them." (*Mesarosh v. United States*, 352 U.S. .....)

No more, we submit, can it afford to abide with a conviction based upon illegally obtained evidence.

For the foregoing reasons the judgment of the court below should be reversed and the cause remanded to the District Court with directions to enter an order granting the motions for judgments of acquittal made on behalf of each of the petitioners.

Dated, San Francisco, California,
November, 1956.

Respectfully submitted,
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(Appendix Follows.)

Appendix

EXHIBIT A

PERSONAL PROPERTY AND PAPERS

1	Sleeping bag with tan air mattress
1	Sleeping bag case, Kelly's of Oakland
2	Brown canvas cover, Spiro's of San Francisco
1	Skysleeper Kit bag
1	Tan zipper shaving kit containing:
1	Hair brush
1	Tooth brush
1	Bar soap wrapped, Ivory, hotel size bearing name Hotel Regis, corner 11th & K Streets, Sacramento, California
1	Shoelace
2	Packages pipe cleaner
1	Pencil flashlight battery
4	Razor blades
1	Package lighter flints—Ronson
1	Spool fishing leader material
1	Bar soap, hotel size, wrapped, with "Pearl" on one side and "Hotel Regis" on other
1	Paid covered small size bag with zipper for pillow
1	Pillow, cotton filled, small, white. No identifying marks
1	Tin drinking cup with initial "W" cut in bottom
1	Bottle 2 ounces Carters Blue Black Ink
1	Small box "Swingline Tot Staples," with "150" written on cover
1	Prince Albert tobacco—pocket size can
1	Key—on ring—Master Lock Co., Milwaukee
1	Calendar—Shell Oil Co., Billfold size
1	Digest of Angling Regulations for State of California—1953
1	Pair Turtoise Shell (dark brown) rimmed glasses with broken left lens
1	Plastic yellow folding type tobacco pouch with some tobacco and pipe cleaners
1	Man's metal expansion band 1/2012K gold top—Stainless steel back
1	Pencil sharpener—plastic—Vest pocket size
1	Polychrome duplicating ink—pound size

1	Padlock—"Master 77"—#5926
1	Carters Rubber Cement
1	Friction tape—1 roll—slipknot
1	Rubber top—partially used
1	Pair socks—men's—grey—dirty
1	Ink—Parkers Superchrome
1	Ink eraser—partially used bottle
1	Key—"Ilco" #1054K—by Independent Lock Co., Fitchburg, Massachusetts
1	Handkerchief—dirty
1	Pamphlet of "Tour"—California Hotels
2	Bottles Solution of Hydrogen Peroxide by McKesson's, N.Y. (1 small)
1	Roll cotton
1 pr.	Sunglasses and leather case
1	Can Briggs pipe tobacco
1	Ronson cigarette lighter & cigarette case combination (empty)
1	Tin Prince Albert Pipe Tobacco
1	Tin can containing change
1	Jar scalp pomade, dark, by Oglevie Sisters, N.Y.
1	Pocket knife, red, Victoria Switzerland Armee Suisse
1	Bottle Richard Hudnut Formula A-10 for men for hair and scalp treatment
2	Cans bandaids
1	Bottle Jergen's Lotion
1	Box—empty, marked Craftsman 25
2 pr.	Glasses, 1 light and 1 dark frames
1	Tobacco pouch, red plaid
1	Sponge, blue
2	Bottles Alka-Seltzer
2	Tubes toothpaste, Chlorodent (1 small & 1 large size)
1	Bottle Pepto Bismol, marked 98
1	Can Sopronol for athletes foot
1	Can Rise Shave Cream marked "59" on side
1	Craftsman 25 Electric Shaver and cord in red plaid zipper bag
12	Glass tubes with stoppers "List No. 2032 Procaine Hydrochloride 4% Epinephrine 1:50,000 Abbott Laboratories Lot 6243575" with "Cook Waite" on end of stopper

1 Mirror, two sides, for shaving
1 Sunbeam Electric Shaver & plastic case with cord
1 Jar
1 Bottle Williams After Shave Lotion
1 Toothbrush
1 Debutante Hand Cream
1 Bottle Squibb Mineral Oil
1 Bottle Pacquins Hand Lotion
1 Bottle brown pills—unmarked
1 Small bottle Neohelramine Hydrochloride
1 Bottle Eljay Aspirin with black marks "BY" on label
1 Styptic pencil in plastic case marked with label "Handy-Spot Price 10¢"
1 Bottle McKesson's Boric Acid Crystals—4 ozs.
2 Packs Dill's pipe cleaners
1 Pack Kent cigarettes
1 Pack Kools—open & half empty
1 Pack Camel cigarettes
5 Pipes—smoking type
1 Tube Nupercainal Ointment—empty
1 Tube Barbasol Shave Cream—empty
1 Pack Gillette blue blades in dispenser
20 each razor
1 Gillette razor
1 Metal pipe cleaning instrument manufactured by Rogers and made in England
1 Bottle Mercurochrome
1 Jar Vaseline Jelly—white
1 Bottle 6.12 Insect Repellent
1 Bottle Calamine Lotion
1 Brush (wire)
1 Pencil "Winx" black with metal cap
1 Plastic cup, orange
1 Bottle Avon Shave Lotion
2 Razors, 1 Gillette—1 single edge, no name
1 Bar Palmolive soap
2 Eveready batteries for small flashlight
1 Roll fishing leader
1 Tube Boyle Zinc Oxide Ointment
1 Eveready battery size 915 AA
1 Box Bayer Aspirin
1 Tube Ipana Toothpaste

1 Tube Chloresiun Toothpaste
1 Fingernail clipper "La Cross"
1 Pack Blue Star Razor Blades
1 Brush, small, for shaver
1 Flashlight bulb 112
1 Plastic, brown zipper shaving kit
1 Sportsman's Guide with map
Maps by Edward W. Pulver & Son, copyrighters of Calif. Los Padres Nat'l. Forest
1 Book—Oregon Hunting Regulations 1952
marked in green ink "Peter Don's Sportsman Supply, Crescent Lake, Oregon"
1 Map of San Francisco by SF Chamber of Commerce
1 Map of Twain Harte locating cabin in ink
"1.6. Cabin" with route drawn in ink.
Paster on bottom card of James Morrow, Real Estate Broker, Twain Harte, Calif.
1 Map Summit District, Stanislaus Nat'l. Forest
2 Plastic, brown glass cases marked on top "Polaroid"
1 Index to topographic mapping in Calif. with pencil marks on back
1 Map of Mendocino Nat'l. Forest
1 Map "Chevron Co." of Nevada
1 Map of Burlingame and San Mateo, marked Hotel St. Matthew
1 Index to towns, mountains, meadows, misc., and Map of Stanislaus Nat'l. Forest and note in ink re: Vernon Swamp, Gravel Lakes, hiking distance, etc. and Topez Lake cut throat trout
1 Map of Stanislaus Nat'l. Forest, Calif.
1 Monkey wrench
1 Small bottle of Halazone
1 Can used saddle soap
1 Rod varnish—small bottle
1 Ferrule cement
1 Metal cap—"Egg lug"
1 Ever-Ready flashlight battery
1 Small can of bouillion cubes
14 Lead sinkers
1 Spinner
3 Bobbers
1 Pocket knife—3 blade
3 Split Shots containers (empty)

8 Face cloths
1 Fish hook on short wire line
2 Brown canvas quilted sleeping bag
1 Sleeping bag mattress—made by Wilber & Sons,
590 Howard Street, San Francisco
1 Cover for sleeping bag—Mfr.—Kelly's of Oakland, Calif.
1 Marclay play shirt—knit—green and yellow band
1 Yellow T shirt—man's typo
1 Gantner, size 32. blue—swim trunks
1 Blue T shirt
1 Blue and white striped pajama bottom
1 Blue—long sleeved jersey
1 Health Gard white sweat shirt. Size 38
1 Blue men's shorts, size 36
1 Wilson Bro. size 42, men's undershirt
1 Health Gard, size 34, long underwear
1 Acetate—Nylon—gray men's shorts
1 White muslin bag
1 Grewe' knitted sweater, V neck, maroon
2 White T shirts—Superior Brand—Medium size
1 White T shirt
1 Fruit of Loom blue men's shorts
1 Jambi—white T shirt—size 42-44
1 Ribbed T shirt—off white
1 Blue necktie—silver color feathers
1 Pair Navy blue knit gloves
4 Men's cotton handkerchiefs
1 Pair striped shorts
1 White cotton T shirt
1 Onesta T shirt—white
4 Neckties—miscellaneous colors
9 Pairs, men's socks
1 Brown knit sweater "John Wanamaker"
1 Overseas bag—Army type, olive drab, with 3 small hooks
on outside zipper—containing:
9 Handkerchiefs marked
1 Yellow T shirt "20" & "NL" (?)
1 Bathrobe—Hale's Men Store
1 Raincoat, plastic
3 Christmas cards all ident.:
"To Daddy from Carol"
"To Daddy from Carol"
"To Carl from Marge"

4	Keys on safety pin for locks on outside of bag
	2 ea. Slaymaker 62—for locks on outside of bag
	1 ea. Slaymaker 63—for locks on outside of bag
	1 very small—says "Made in USA"
2	Keys loose for locks on outside of bag
	1 Slaymaker 61
	1 Slaymaker 63
1	Pouch, brown
1	Toothbrush
1	Bottle Roux Rinse 105½ light auburn
1	Bottle Petroleum Jelly—Vi Jon
1	Toothbrush & case
1	Package pencil lead
1	Pocket & Desk stone
1½	Pipes
1	Brush—"Solid Black, USA"
1	Lipstick, Westmore
1	Female plug
1	Imitation leather small case
1	Battery—Flashlight, Eveready
1	Pencil—Loveliners brown
1	Can Esquire Boot polish—mahogany
1	Bottle Vaseline hair tonic
1	Tube Ipana toothpaste
1	Laundry paper wrap
1	Sweater—sleeveless
1	Scarf—plaid
1	Pair brown crepe soled leather loafers (John Ward—Men's Shoes)
1	Blue-gray woolen sweater, ½ sleeve with casting fisherman knit into garment. A "Barclay Playshirt"
1	Purple wool imitation lambskin wrap around short coat with long sleeves—attached to coat:
1	Wooden brown doe
1	Wooden faun
1	Pair knit green wool socks
1	Small ball, purple yarn
1	Roll white wrapping string
1	Roll #50 J & P Coats purple-gray thread
1	Army Air Forces glass case, brown, no contents
1	Pair gray knit socks, low
1	Sterling silver chain

1 Necklace with 3 turquoise pendants and Rhinestone backing
1 Brown leather belt on one pair of blue "Levi's" button fly
1 Pair blue "Levi's"—zipper fly (on side)
1 Pair white short soxs
1 Return postage envelope
1 Newspaper, page 16, at bottom of bag, Los Angeles Examiner, Sunday, December 16, 1951

Box of miscellaneous kitchen equipment as listed:

4 knives
5 Forks
1 Pancake turner
1 Can opener
2 Metal cups
2 Pots
1 Lid
3 Pie tins
1 Frying pan
1 Can Sterno
1 Can opener
1 Beer can opener
1 Large spoon
1 Clove garlic
1 Partially filled ½ lb. can of coffee
1 Partially filled 1 lb. can of coffee
2 Small bags of flour
1 Gal. can of gasoline or kerosene
1 Bottle insect repellent
1 Can pepper
1 Can paprika
2 Shakers of salt
1 Can Accent
1 Can sugar
1 Package bay leaves
1 Package of paper plates
1 Roll wax paper
1 Grater
1 Pot
1 Kitchen pan lid
1 Fire tong
2 Folders of Forty Finest Restaurants, San Francisco Bay Area
1 Miracle Miroil Fold Road Map, Eastern United States by Mobilgas

1	Issue of Everybody's Restaurant Guide
1	Khaki-colored drawstring bag containing:
1	Hair comb in case
1	Pair scissors
1	Safety razor
1	Partial tube Mentholatum
1	Plastic soap dish
1	Toothbrush
1	Bottle LePage glue
1	Box gauze
1	Partial box aspirin
1	Tie clip
1	Bottle Noxzema Skin Cream
1	Part bottle Stephan's Dandruff Remover
1	Partly filled bottle unidentified liquid—white in color
1	Robe—white, red, gray striped
1	Air mattress, rubber, olive drab
1	Mackinaw jacket, Malemute Brand
2	Nylon short-sleeve sport shirts, white and tan by MacMaster, size 15-15½
1	Topcoat—tan, soiled
1	Brown, man's overcoat
1	Short-sleeve sport shirt, terrycloth, faded blue with design on chest
1	Brown corduroy jacket
1	Blue single breasted man's jacket
1	Blue trousers
1	Green long-sleeved sport shirt, nylon, by Don Juan of California
1	Copy San Francisco "Chronicle," 8/17/53
1	Simplicity Fashion Preview
1	Magazine clipping re Steelhead fishing
7	Paper folders advertising "The New Harju Vertical Venetians" and all bearing statement "Manufactured by Harju Vertical Venetian Blind Co., 422 Douglas Avenue, Redwood City, California, call Emerson 8-4210"
1	Accordion type cardboard folder color guide of Flexalum Spring Tempered Slats with following stamped on front and back: "Harju Vertical Venetians, 422 Douglas Ave., Redwood City, California, Phone EM 8-4210"
1	Printed Craftsman Electric Shaver Guarantee, dated 6/26/53

12 White envelopes containing newspaper clippings of chess movements
43 Newspaper clippings of chess movements
1 Newspaper clipping captioned, "Drive Two hours—Then Rest"
1 Yellow plastic toothbrush in case
1 Cash register receipt, dated 4/10 for $1.88 to Palmer's Drug Store, Hayward, California
1 3 x 5 Spiral brown notebook with no writing
1 Blue Wool knit sweater, size 40, by "Wieboldt's"
2 Brown canvas sleeping bags, no identification marks, with zippers on 3 sides and 1 side being faded. Both are the same.
1 Thin mattress for sleeping bags having tag #GAL-2652 and manufactured by Wilber and Son, 590 Howard Street, San Francisco.
1 ½ plate
10 Budweiser beer cans
1 Old Taylor Whiskey bottle
1 Mustard jar
1 Army napsack—empty
1 Army-type sleeping bag cover, contractor, Seattle Quiet Mfg. Company, stamped "Quartermaster, Seattle General Depot."
1 Dish rag
1 Air pillow in case
1 Sleeping bag with red air mattress, all around zipper on bottom and side
1 Metal music stand
1 Mandolin with pick, "Nick Lucas"
1 Violin, bow and case, leather, cloth package containing resin by the A. B. Rosin, and flexible cover made in England, W. E. Hill and Sons, 140 New Bond St., W. Violin bow has name "Tourte". Violin says "Copy of Antonin Stradivarius, made in Germany"
1 Langley 8' 6" fly rod
1 True Temper bait casting rod
1 Sportsman Rod
1 Cal Royal spinning rod
1 Open bag charcoal briquettes
1 Green metal fishing tackle box called "Union Utility Chest" containing miscellaneous fishing tackle including hooks, lures, sinkers, etc.

1 Fishing bag, cloth net
1 Green garden trowell
1 Small Army napsack containing additional fishing tackle, including flies, reel, salmon eggs, and miscellaneous first aid equipment bandages, snake bite kit, etc.
2 Wood and wire coat hangers
1 Gallon can of gas
1 Brown fabric zipper handbag with following contents:
1 Razor set, Eversharp
1 Bottle aspirin
1 Fishing guide book
2 Decks playing cards
1 Pair scissors
1 Roll toilet paper
1 Hair comb
1 Cup
1 Plastic refrigerator bag
1 Camouflage parka (incomplete)
1 Green portable cooking stove
1 Hand axe
1 Short handle spade
1 Ocean City brown reel
1 Brown cloth zipper handbag containing:
1 Deck playing cards
1 Soap box
1 Sal King fly rod reel
1 Bache-Brown Spinster reel
1 Water bag
1 Shoulder pack bag with stenciled "Orlando J. Perrett, 35392439"
2 Fishing dip nets "Sport King"
1 Cardboard carton, label on end reading "Tameroff Imperial Vodka" containing:
1 Pair leather mocassins
1 Pair Army type high work shoes
1 Pair low white tennis shoes, size 8½
1 Pair brown leather half boots with buckles "Wearmaster"
1 Flashlight, Wing Star brand
1 Pine cone
1 Piece cotton clothesline
1 Minnow bucket containing:
1 Papermate pen

1	Ocean City reel
1	Damaged flashlight
1	Small stapler and staples
1	Midget stapler
1	Can Revelation tobacco
1	Spring paper clip
1	Partial package rubber bands
1	Mimeograph stylus
1	Plastic refrigerator bag
1	RCA portable radio, Model BX57
1	Sentinel portable radio with plastic case Model 316P, serial 29004
1	Pair black rubber overshoes
2	Windshield wiper blades
1	Metal screen
1	Duck, greasy empty tool bag
1	Brown tweed reversible type overcoat—safety pin in sleeve
1	Match folder
1	Pair brown cloth gloves—man's
1	Orlon-nylon black and white check sport shirt (Jello match folder in pocket)
1	Clipping—"San Jose Evening News," 8/26/53 (Inside Labor)
1	Oakland Tribune—8/26/53
1	San Jose News—8/26/53
1	Sacramento Bee—7/3/53
1	Cylinder Polychrome stencil duplicating ink—1 pound
1	Impress duplicating ink—½ pint can
2	Expanding envelope—School wallet with pasted ink label Trials—Calif. H.A.W. GR—(?)
30	Sheets unused stencil paper
1	Paper folder—initials N W
1	Paper folder—dark brown—notation #II
1	Broken package, approximately 450 blank Autograph Mimeo sheets
2	School wallets—brown—1 labeled ORE and 1 labeled MM&RM
1	Carton 8½ x 14 mimeo sheets from N. W. Paper Co., Cloquet, Minnesota, Carleton type
1	Broken carton (approximately 100 sheets) same as above
1	Pack matches—advertising Sniders Donuts
2	Packages unused polychrome stencil

1 Unopened box Roux oil shampoo tint with red marking 150
2 Bottles from Palm Pharmacy, 1730 Mission St., Santa Cruz —PH 7260, #1346 Dr. Koskela 8/17/53 Mrs. (cut off) prescriptions
1 Bottle Tincture of Merthiolate from Twain Harte Pharmacy, California
1 Pill box containing 2 small red pills and marked in ink on top: "Dienesteral .5 mg50-145 Mrs. Kaplan on red— 5 white"
1 Pillbox with numerous white pills on outside in ink: "Dunesteril 1 mg50-115 Mrs. Kaplan one today, increase one daily"
1 Bottle from Palm Pharmacy, 1730 Mission St., Santa Cruz, #1347; Dr. Koskela 8/17/53, Mrs. (cut off)"
1 Bottle Roux Oil Bleach "2 drab"
1 Bottle same shape & color but no label
1 White envelope with pencil writing on poker hands
2 Sanitary belts
1 Receipt, Krazen Auto Supply, 138 E. Santa Clara, San Jose, Total $1.44—dated June 13
1 Receipt, Pay Less Drug Store, Reg. #51—dated June 13, Total $2.38
1 Siskiyou County map, stamped distributed by Thomas Bros.
1 Blue wool sweater, size 40, long sleeve pullover, tag of Wieboldts in Evanston, Chicago and Oak Park
1 Leather men's belt, brown, with torn zipper compartment
1 Topographic map, California, Lodoga Quadrangle, 15 minute series
1 Index to maps of California by Geological Survey, Department of the Interior
1 Man's shirt, tan, long sleeve, button down flaps on both chest pockets, soiled, with tag in inside of neck marked "Game and Lake Sportswear, Expertly Tailored," and with the following laundry marks on inside of collar band: Q-5, HZ; 394B (the last character believed to be "B" is not clear and might be the number 1, 2, 3, or 4). Also two other laundry marks not discernible.
1 Blue long sleeve man's shirt, flap pockets on chest, tag inside back marked "Van Heusen, 16, 16½ (L), Vangas, completely washable," with following laundry marks inside collar: 3941 (maybe 63941—first digit somewhat smeared); 646855; 5——(faded)

1 Man's blue dress shirt with tan or gold stripe, bearing tag "Imperial trade-mark, Sanforized," with laundry marks in collar as follows: 05 W L60: Q5

1 Faded beige man's long sleeve sport shirt with label of "Marlboro, Jockey Club (1) Washable" with following laundry marks in collar: WL60; 394— (last digit either a "one" or an "A"); 05; 0-5; Q-5; 165; B918855

1 brown man's jacket, single breasted, with inside label "Witty Bros. Craft," has the following marks: Inside breast inner pocket is tag "Witty Brothers, New York, A84630; near shoulder attached to lining of right sleeve is stapled cleaning tag 90/93371; several inches below shoulder in inside of right sleeve, written on lining are numbers 14/5. Has pipe cleaner in breast pocket and loose tobacco

1 Light tan corduroy man's jacket with label "Howard Sport Apparel," tag in collar marked size 40; with following marks: inside left sleeve on lining are written words "New Man SA (probably 8A); inside right sleeve on lining is number "1460"; inside in breast pocket, inner edge of lining are numbers "1832" or "1532"

1 Man's single-breasted blue suit coat, no label, inner lining of right sleeve contains lettering "27/99692"

1 pr. Men's tan or beige trousers with brown leather belt, worn and mended; left pocket has laundry mark $\frac{1}{968}$

1 pr. Men's blue trousers with following marks: right pocket has laundry marks "4649" and "27/99269" and either "B-5" or "135"; also two circular marks (believed coin marks) about size of dime with marking in circle not discernible; inside waistband to right of zipper is the word "HERMES" stamped four times; rear right pocket has paper tag stapled to it with number "6503" thereon

1 pr. Man's tan trousers with tag sewn to rear left pocket marked "Test reg. U.S. Pat. Off. Best by Test Sanforized"; right pocket contained the following items:

1 heavy black pocket knife

1 black Ace pocket comb

1 small metallic case with compartment on ends containing clear objects of glass or plastic

1 small round pink box containing two small green objects

1 box marked "Para-curve B & S"

The above items have been removed from the trousers.

1 Coat hanger with name of Recco Cleaners, Ph. 1015 1045-11th St.
1 Hanger with markings, The Temple, BAyview 9211, 5041 Geary St., Cleaning and Dyeing
1 Hanger with markings, Virginia Cleaners & Dyers, 2109 Virginia Ct., Berkeley, Calif., phone Ashberry 1345
1 Hanger with markings, Hastings, San Francisco, Oakland
1 Hanger with markings, White House Dyeing & Cleaning Works, 174 - 14th St., San Francisco, Phone HEmlock 0476
1 "Schermer's Library of Musical Classics, Vol. 833, Pleyel Op. 48, Six "Little Duets for Violin and Piano;" stamped on front cover is "Lloyd A. Wollmer Co., Music, Burlingame, Calif."
1 Mobilgas Miracle Fold Road Map, Western United States
1 Registration holder removed from auto containing following item:
Automobile Insurance Service Card bearing name GILBERT BYRNES, 169 Inner Circle, Redwood City, Calif., policy #CA377690, agent, David D. Bohannon Organization, 859 San Mateo Drive, San Mateo, Calif.
1 Pair men's blue trousers with suspenders attached; have red stripes in weave; right pocket has laundry mark "H" card bears name of General Casualty Company of America, First National Insurance Company of America, General Insurance Company of America, nearest office at 206 Sansome St., San Francisco 4, California
1 Remington Noiseless typewriter, serial #X370531
1 Portable Royal typewriter, serial #0-431783
1 Mummy-type sleeping bag with U. S. stamped on outside of bag
1 pr. leather slippers—Cherokee
1 pr. Worn plastic scuffs
1 pr. brown leather gloves
1 Newspaper clipping, paper unknown, begins "The—1953 date article Morse will back Democrats in '54"
1 Richfield Oil Company of California map
1 Shell Oil Company map of San Francisco—Bay area.
1 Shell Oil Company directory map of Auto Courts, Hotels, Resorts and State Park Camp Sites in Northern California and Nevada
1 pkg. Dill's Best pipe cleaner
1 bag with writing paper and envelopes

1 Brown cloth zipper jacket, McGregor, size 42 with 1 small Howart single cell flashlight in pocket
1 Ted Trueblood's Fishing Handbook
1 Gray Adam hat, Executive Quality, size 7, men's
1 Tan all-weather man's hat, size 7⅜
1 Tan zipper jacket, McGregor, size 42 with cloth bag in one pocket marked "Airex"
1 Cloth sweatshirt, size 38-40 "Double Play"
1 Red and black plaid fishing rod cover
1 Terrycloth white and red short-sleeve sweater, size medium, Gantner
1 Short-sleeve shirt, "Harper," medium, white and brown check with Eversharp Ballpoint Pen clipped to pocket
1 Box unused carbon paper
1 Partial box of Eaton's Berkshire Typewriter Paper with miscellaneous envelopes
1 Chess set
1 Shermer's Library of Musical Classics, Vol. 848, Sevcik Op. 8, for violin
1 Shermer's Library of Musical Classics, Vol. 297, for two violins
1 Shermer's Library of Musical Classics, Vol. 230, for the violin
1 Book of violin music by Amsco Music Pub. House
1 Copy of Everybody's Favorite Album of Violin Pieces published by Amsco Music Pub. Co.
1 Copy of Everybody's Favorite Album of Violin Pieces, Series #6
1 Copy of Violino Principale
1 Spiral Warner's #4, Spiral Manuscript book
1 Nick Manoloff's Mandolin Method
6 Issues of "Chess Review" for months June, July, August, September, November, December, 1951
1 Copy Oregon Angling Regulations for 1952
1 Check board
1 Copy U. S. News, July 24, 1953
1 Copy of Hometown, The Rexall Magazine, August, 1953, bearing City of Santa Cruz, California, on back page
1 Thomas Bros. Map of the City and County of San Francisco and East Bay
1 Recipe box containing puppet
1 pr. Argyle socks

1 pr. Brown socks
1 pr. Blue socks
1 Cloth money belt—empty
1 Black ring notebook
1 Blue denim cap
1 pr. Wine-colored woolen gloves
1 Woolen stocking cap
1 pr. Munsingwear, size 36, long underwear
1 long-sleeve undershirt
1 pr. Gantner wikies, size 36, green shorts
1 pr. Blue Fruit of the Loom shorts
1 Jacket—tan color, Essley Functional Jacket
1 Blue cloth zipper satchel
1 pr. Brown men's shoes
5 Violin strings
1 pr. Hair clippers
1 Pocket knife
1 Scripto Ballpoint pen
1 Canvas men's hat
1 Plastic raincoat
1 pr. White shorts, size 34, Patent 2231299
1 Brown plaid shirt, Penney's Towncraft
2 Leather belts, 1 brown, one cordovan
1 Rust-colored tie with tag "Ward & Ward"
1 Blue-grey tie with tag, "Pilgrim"
1 Blue tie with tag, "Van Heusen, Van Trevor"—all silk
1 Tie with tag, "El Denver, Los Wigwam Weavers, Denver, Colo.
1 Rust tie without label
1 pr. Soiled gray flannel slacks
1 Canvas knapsack with stenciled "J. J. MILLER"
1 pr. Socks, cotton argyle
1 Handkerchief with green and brown border
1 Green handkerchief with white border
6 Soiled white handkerchiefs
1 White undershirt
1 White T-shirt
1 pr. Healthguard medium white jockey shorts—soiled
1 pr. Soiled gray slacks—men's
2 Mandolin picks
1 Envelope with "Mak-Ur-Own" celluloid index tabs

2 Maps of California—Chevron Map—points of interest and touring map
1 Richfield Street Guide, San Francisco Bay Area
1 Empty soiled white envelope
1 Nevada Map—Chevron
1 Richfield Street guide, Los Angeles
1 Map of San Jose and Santa Clara County
1 Blue or grey felt hat, man's, size 7⅛, sweatband bearing name of Dobbs Cross Country, Reg. U. S. Pat. Off. and *Brey's*, 1062 Wilson Ave., Chicago. Inside crown has marking of Dobbs Fifth Avenue, Cross Country. Attached to felt behind sweatband is tape marked "Reg. B82459 600" 5⅜ 7⅛ size (Oval to duplicate block)
1 Cream-colored Panama with wine-colored band, man's, size 7. Sweatband with markings Stylepark, New York, Philadelphia and 1516 Chestnut St., Philadelphia. Innerside of crown marked 27320 (6) 14 7; innerside of sweatband is labeled: color—tan coal, style EC89, price—$10.00, 7 size
1 Tan Panama hat, men's, wine hat band. Sweatband bears marking Macy's Men's Store, New York. Inside of sweatband is marking 7⅛ and price tag marked Macy's D 39 H 2.98. Inside of crown is stamped number 8 and "IK"
1 Assembled Transvision television set #615935
1 Brown cardboard box for "Print-O-Matic Rotary Stencil Duplicator which contained the following:
1 Model 4-A Print-O-Matic duplicator, serial #2670
1 Used stencil on the roller of the duplicator from which a copy was run off which is also in the box
1 Light yellow sport-type man's shirt, laundry mark D-5, L-40
1 Van Huesen 15-15½ Air Weave sport shirt, laundry mark D5W L60 D5 L40
1 Citadel man's gr. and white striped shirt, laundry mark D5—4H2
1 McGregar long sleeve, off-white, sport shirt, Medium Large, D5L. 22 41—18855 05 22
1 Ruggers BVD yellowish sport shirt, short sleeve, 8955 laundry mark
1 Brent sanforized grey and white striped man's short 15½-32, laundry mark: WL60-L60 . D5 . D5 05

1 Blue, long sleeve, sport shirt, laundry mark: D5 03441
1 Shirt—long sleeve—John Wanamaker—Wanatex Laundry Mark—039H 0-5 05 W WL60 L60—L60
1 Trousers—man's—herring bone, blue-gray, laundry mark on left pocket New Man SA, right pocket 27/9969 B5 1460 6247
1 Blue sport shirt—short sleeves, blue and white trim
1 Light blue denim jacket
1 Trousers—men's—solid blue, soft finish—appear to be home sewn
1 Green handkerchief
1 Papers from 1950 Chevrolet, exclusive of registration
1 Package of papers wrapped in tissue paper and found on dining room table
1 Brown cardboard box for "Sperry Pancake and Waffle Mix" containing papers and found on the floor of the bed in the bedroom above the living room side of the house
1 Unmarked brown cardboard box bearing the numbers "1952-43" on one end which contains papers and was found on the corner table in the bedroom above the living room side of the house
1 Brown cardboard box for "Rancho Soup" containing papers which was found at the foot of the bed in the bedroom above the living room side of the house
1 Brown cardboard box for "Burgermeister Beer" containing papers which was found on the floor of the hall closet at the head of the stairs on the second floor
1 Brown cardboard box for "First Call Dog Food" containing papers which was found on the floor at the foot of the bed in the bedroom above the living room side of the house.
1 Tan leather "Flex Bilt" expansion, single-handled brief case containing papers which was found on the bed in the bedroom above the living room side of the house
1 Brown leather suitcase with two hasps and one lock containing papers which was found in the closet of the bedroom above the living room side of the house
1 Tan leather suitcase with two hasps but no lock containing papers which was found on the bed in the bedroom above the living room side of the house

1	Brown split cowhide zipper briefcase without handles containing papers which was found on the dresser in the bedroom above the living room side of the house
	Papers, including wallet with papers for JOSHUA NEWBERG, found on and in desk located in living room
	Billfold and papers for ROBERT E. NEUMAN, or NEWMAN, found in a pair of tan gaberdine trousers on a chair in the living room
	Wallet with papers for WILLIAM GORDON and a brown leather money belt with money found in a pair of tan cotton pants on the straight-backed chair in the living room
	Miscellaneous papers for LEE KAPLAN and RICHARD KAPLAN found in a handbag in the possession of Defendant SHIRLEY KREMEN at the time of arrest. The handbag was returned to her
1	Wallet containing papers for JOHN F. BRENNAN found on the person of ROBERT THOMPSON

CASH AND CURRENCY

$28.63	From envelopes in the brown leather, "Flex Bilt" expansion briefcase
86.45	From envelopes in the brown leather, "Flex Bilt" expansion briefcase
993.75	From envelopes in the brown leather, "Flex Bilt" expansion briefcase
33.13	From the wallet with papers for William Gordon
520.00	From hidden money compartments in the leather belt on the trousers containing the wallet with papers for William Gordon
5.45	From the purse with papers for Lee and Richard Kaplan
236.28	From the wallet with papers for Robert E. Neuman or Newman
383.36	From the Wallet in the possession of Robert Thompson with papers for John Brennan

The following items were identified by Shirley Kremen as her personal property and returned to her on September 25, 1953:

1	RCA Victor Album—Symphonies 1 & 9, 3 records
1	Record Album—Capitol Records by Sibelius, "Symphony #1 E minor, Op. 39"
1	Remington record—"Bach Sonata"

1 Columbia record—"Chansons Parisiennes"
1 Parade record, Operatic library series—"Aida"
1 Remington record—"Schumann Sonata in D Minor, Op. 121"
1 Remington record—"Mendelssohn Violin Concerto"
1 Remington record—"Prelude to the Afternoon of a Fawn"
1 Remington record—"Paganini Violin Concerto in D Major"
1 Remington record—"Sonata for Violin & Piano, C Minor"
1 Columbia record—"Edith Piaf Encores"
1 Remington record—"Op. 13 in C Minor"
1 Remington record—"Concerto in D Major"
1 Columbia record—"Beethoven Concerto in D Major"
1 Mercury record—"Concerto for Violin & Orchestra"
1 Royale record—"Brahms Violin Concerto D Major"
1 2-Record album by Royale—"Choral OP. 125"
1 Album 5 ea RCA Victor—Symphony #7 in A, serial #18G11D
1 Album, 4 records, RCA Victor—"Tschaikowsky Concerto #1 in B Flat Minor"
1 Album, 2 records, RCA—"Grieg Concerto in A Minor"
1 Album, 5 records, RCA Victor—Beethoven "Archduke Trio"
1 Album, 2 records, RCA Victor—Classical Symphony
9 Towels—various colors, cotton bath and face size—no identifying marks
5 Wash cloths, small, various colors, no identifying marks.
1 Yellow bath towel made by "Cannon"
1 White muslin cloth (looks like dish towel)—no identifying marks
1 Muslin dish towel "Martex Dry-Me-Dry"—white, with red and brown stripes on sides
1 White torn, burned sheet, used for ironing—no identifying marks
1 Ping Pong net with 2 holders (no name)
1 White plastic sunglass holder—"Hinge Patents Pending"
1 Pins—package of DeLong sewing type
1 Leather case for glasses
1 Towel—face type—Cannon

1 Towel—white muslin
1 Plastic case of miscellaneous small items—razor, spools of thread, lipstick, paper clips, wire
1 Seiberling Hot Water bottle & rubber hose
2 Jars Avon Cleansing Cream, 3½ ozs. & 1¾ ozs.
1 Plastic box with hair curlers and 1 tweezers
1 Foto-Flex Camera, empty
1 Mirror with green frame 3" x 5" approx.
1 Bottle Pinwave Pincurl Permanent in box
1 Eyelash curler
1 Plastic container, red, Maybelline Mascara with brush
1 Fuller hair brush
1 Card of Clinton Hooks & Eyes & Loops
1 Soldering iron, electric—by Harmic Mfg. Co., Grove City, Pa., No. 86, 75 Watts; 115 Volts
1 Plastic shower cap—yellow
1 Box powder
1 Comb, white
1 Debutante Powder Shampoo
1 Bottle Avon Astringent
1 Bottle Breck Shampoo
1 Tube lipstick
1 Bottle NTZ Antihistamine Decongestant (to relieve nasal congestion)
1 Fuller brush
1 G.E. automatic toaster
1 Colombia 3 speed record player
1 Box of Meds—partially empty
1 Package of toilet tissue—4 rolls
1 Package napkins
1 Cotton flannel bed cover—grey
1 Hammer—Marion Tool Co.
8 Bath towels—various colors
1 Kleenex—full
1 Scot towels—paper
1 Crescent wrench
2 Sierra Pine soap
1 Box aspirin (4 aspirins)
5 Hand towels
7 Pillow cases
1 Bed sheet (small letter K sewed on; 2057 laundry mark)
3 Table cloths

1 Blanket—U.S. Navy—Med Department
1 Bed sheet—Initial K (laundry 2057 A81)
1 Bed sheet—unmarked
1 Dark blue—turtle neck—sweater, knit
1 Suitcase, black imitation leather
1 Package Nylmerate Jelly (used) with directions
1 Red and blue polka-dot bra, self-supporting
1 Pair (Bronco-ettes by Mallo-Maid of California) Woman's blue denim pedal pushers
1 Pair white tennis shoes, canvas tops, rubber soles
1 Size 6⅞ 100% wool red baseball cap made by Gortman Hat & Cap Co., Oakland, California
1 Spangled 5" x 6X evening bag with zipper
1 Roll of "Jumbo Ripple-Tie"—blue
1 Pair white net mits
1 Pair white nylon evening gloves
3 Yards, ½" elastic, yellow
1 Pair, nylon briefs
1 Pair saddle shoes, rubber soles. Top white with black saddles (female)
1 Large size red and white beanie hat with "LEE" sewed on front
1 Woman's green cotton waffle weave suit (Eisenhower type jacket)
1 Yellow blouse, woman's, Rhinestone buttons, ripple collar, ½ sleeves
1 Woman's—Mode O'Day—White deep V neck blouse, no sleeves; one catch, no buttons
1 "Donig" white lace type woman's blouse, no sleeves
1 Rhinestone necklace with fixed pendant
1 Pair Rhinestone earings, square, made by "Phyllis"
1 Pair star type Rhinestone earings made by "Nemo"
1 String of seed pearls with rubber band on end (damaged)
1 Gray covered jewelry box, "Phyllis Originals"
1 Pair yellow "Moc Lucks" socks
1 Red and white breakfast coat, wool, red buttons, red collar
1 Flannel bed sheet—gray
1 Damaged Parker fountain pen with silver colored metal cap and wine or brown colored plastic pen
1 Woman's green overcoat with gold lining; has paper cleaning tag stapled to bottom edge of lining with number "25/940"

1 Infant dress, size 6 mo. made in Philippines
1 Kerchief—black and gold
1 White short sleeve Bermuda knit sweater—woman's type
1 White short sleeve sweater—woman's
1 Sweater—yellow—short sleeve—woman's Orbacks—made in England
1 Sweater—lavender—short sleeve—woman's
1 Sweater—green—knit—short sleeve—woman's
1 White sweater—turtle neck V

Martin Knit Wear of California—woman's

1 Light blue—woman's briefs
3 White briefs—woman's
1 Bra—Silbra strapless
2 Bras, white
1 Pants—pink—woman's
1 Night gown, white—Dashing Deb
1 Bathing suit, woman's—yellow, blue, white
1 Night gown, size 38, Swank Shortie
1 Pair gloves—white cotton, blue cuffs

Pay Less Drug Store

1 Undergown—top half—woman's
1 Slip—white
1 Breakfast Coat, Truzette of California
1 Slip—black and white
1 Pair of pajamas—flannel, blue and white
1 Girdle—Slackies
1 Bra—Alloette
1 Garter belt—Olga, California
1 Swim suit, red and white plaid, Gantner of California
1 T-Shirt—yellow—short sleeve
1 Sweat shirt—gray cuffs
1 Pair white work gloves
1 Blouse—pink and white striped
1 Bra—pink
1 Scarf—woman's—multi-hued
1 Blouse—pink—Cara Mae
1 Blouse—jersey—pink—zipper
1 Play shirt—knit—green, dark center strip
1 Blouse—Blue and white striped
1 Pair shorts—woman's—light tan
1 Pair pedal pushers—light blue
1 Pair shorts—woman's—blue denim
1 Pair white bobby soxs

1½ Pair stocking protectors
1 Pair Paisley women's shorts
1 Pair shorts—blue denim, woman's, with belt

The following was returned to Attorney NORMAN LEONARD for the defendants January 26, 1954:

1. 1950, two-door deluxe Chevrolet, Motor #HAA786026, 1953 Calif. plates #7B86733, with right door window broken, with registration certificate and following material:

A. In Glove Compartment
4 2½ x 4½ memo book fillers
1 pr. colored driving goggles in case
1 spoon
1 6-inch crescent wrench
1 S-shaped screw driver
1 6-inch yellow handled screw driver
1 pr. cuticle scissors
1 lead sinker

B. On Front Seat
1 Plaid Indian-style blanket

C. On Back Seat
1 yellow and brown fiber and plastic seat cushion
1 blue and red fiber and plastic seat cushion
2 bow ties
1 tin cup
5 wire coat hangers
1 aluminum suitcase coat hanger

D. In Trunk
1 1950 Chevrolet yearbook
1 pamphlet entitled, "Goodhousekeeping in your car"
1 bumper jack
1 set tire chains in bag
1 pair individual tire lug chains
1 lug wrench
1 spare tire and rim

2. 1950 tudor Ford sedan, Motor #BORH156413, 1953 California license #3G1606, with temporary registration and the following material:

A. In truck
1 lug wrench—4 headed
2 lug wrenches—single headed
2 bumper jacks